Since the 1950s, prominent constitutional law professors have often invoked the notion that the Supreme Court acts as an educational institution in American society. On this view, legal scholarship portrays the Supreme Court as a beneficent and inspirational teacher, one who is responsible for imparting unusually enlightened values on the nation. Despite this uplifting analogy’s prevalence within constitutional discourse, two persistent criticisms have unsettled the notion that the Supreme Court in fact teaches...
any lessons at all through its written opinions. First, critics observe that citizens are
generally unaware of even highly salient Supreme Court opinions, and it is hard for
people to obtain a lesson from something they do not know. Second, critics note that
claims extolling the Court’s educational capacities unfold almost exclusively on an
abstract level, rendering it virtually impossible to determine whether anyone has
absorbed the Court’s ostensible lessons and how that absorption occurred.

This Article aims to revive and recast the notion that the Supreme Court educates
by approaching the matter from a fresh vantage point. Rather than proceeding from
the standard premise that the Supreme Court teaches good lessons, this Article inverts
the inquiry by identifying and examining three opinions where the Supreme Court
has taught bad lessons: Buck v. Bell’s validation of compulsory sterilization statutes;
Minersville School District v. Gobitis’s validation of requirements that students
salute the American flag; and New York v. Belton’s validation of police officers
conducting warrantless searches of vehicles when they arrest motorists. Instead of
simply asserting that the Supreme Court taught bad lessons in these three opinions,
the Article offers specific evidence to defend that claim and also addresses the two
primary criticisms of the view contending that the Court can educate. First, rather
than suggesting that the Court taught citizens generally throughout the nation when
it issued these opinions, this Article narrows the focus to identify particular subsets of
the population that the opinions reached and influenced. Second, instead of offering
merely abstract interpretations of how these opinions taught, this Article provides
detailed historical accounts that identify and examine three particular mechanisms
through which students responded to the Court’s bad teaching. Building on work
exploring the phenomenon that political scientists refer to as “policy diffusion,” this
Article demonstrates that the Supreme Court’s bad teachings led policymakers around
the country to learn, emulate, and extrapolate from those opinions. Examining the
Supreme Court’s bad lessons also better positions scholars to appreciate how the
Supreme Court has taught well, both by helping desirable policies become more
widespread and by suppressing undesirable policies. This reconceptualization of the
Supreme Court’s teaching role challenges ascendant theories in legal scholarship
asserting that the judiciary interprets the Constitution merely to ratify the nation’s
consensus values and that it lacks the ability to implement significant social reform.

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INTRODUCTION

In 1952, Eugene Rostow formulated what would become an enduring metaphor within legal circles for describing the Supreme Court’s role in American life.1 “The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers,” Rostow contended.2 During the intervening seven decades, distinguished legal theorists holding a diverse array of competing intellectual commitments have embraced Rostow’s general concept that the Supreme Court is an educational institution.3 Alexander Bickel, Robert Bork, Christopher Eisgruber, Jack Goldsmith, Lani Guinier, Neal Katyal, Ralph Lerner, Daryl Levinson, Sanford Levinson, Carol Steiker, Cass Sunstein, Laurence Tribe, Mark Tushnet, and Robin West represent only a fraction of the many scholars who have entertained the notion that Supreme Court opinions can, in one way or another, educate.4

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2 Id.
4 See Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 26 (1962) (referring to the Court as “a great and highly effective educational institution”); Robert H. Bork, The Tempting of America 249 (1990) (endorsing Rostow’s metaphor); Eisgruber, supra note 3, passim (offering an extended theoretical defense of the educational metaphor); Jack Goldsmith & Daryl Levinson, Law for States: International Law, Constitutional Law, Public Law, 122 Harv. L. Rev. 1791, 1838 (2009) (noting Rostow’s metaphor “has
Ralph Lerner, ff educative e people); Katyal, supra in States nation’s early history); Sanford Levinson, depicting the Court as “an educator” in the context of exploring jury charges issued during the (dissenting opinions).

Although the educational metaphor has received acclamation from on high, the enthusiasm has not been universal. Scholars have leveled two persistent, related lines of critique against the notion that the Supreme Court educates. First, critics have cast doubt on the Supreme Court’s ability to teach lessons by noting that citizens—the Court’s presumed pupils6—demonstrate little awareness of even highly salient judicial opinions.7 As early as 1970, scholars quipped that if the Justices were teaching a class “it is a sad fact that few Americans are enrolled in the course.”8 Although this joke debuted more than fifty years ago, it seems to never grow old, as professors have repeatedly offered slight variations on the theme.9 Second, critics have protested that, because claims about the Court’s educational role proceed on an almost a distinguished pedigree in constitutional thought”); Lani Guinier, Foreword, Demosprudence Through Dissent, 122 HARV. L. REV. 4, 47 (2008) (“Supreme Court Justices teach.”); Neal Kumar Katyal, Judges as Advocates, 59 STAN. L. REV. 1709, 1720 (1998) (analyzing Rostow’s metaphor); Ralph Lerner, The Supreme Court as Republican Schoolmaster, 1967 SUP. CT. REV. 127, 128-29 (depicting the Court as “an educator” in the context of exploring jury charges issued during the nation’s early history); Sanford Levinson, Courts as Participants in “Dialogue”: A View from American States, 59 U. KAN. L. REV. 791, 794 (2011) (exploring Rostow’s metaphor); Carol S. Steiker, Brandeis in Olmstead: “Our Government is the Potent, the Omnipresent Teacher,” 79 MISS. L.J. 149, 178 (2009) (“Supreme Court Justices are, after all, part of the government, and they teach—perhaps most especially through their dissents.”); Cass R. Sunstein, Foreword, Leaving Things Undecided, 110 HARV. L. REV. 4, 69 (1996) (“It is sometimes observed that the Supreme Court’s decisions have educative effects.”); Laurence H. Tribe, Equal Dignity: Speaking Its Name, 129 HARV. L. REV. F. 16, 31 (2016) (advocating the idea that the Court “teaches”); Mark Tushnet, Style and the Supreme Court’s Educational Role in Government, 11 CONST. COMMENT. 215, passim (1994) (exploring the Court’s teaching role); Robin L. West, Foreword, Taking Freedom Seriously, 104 HARV. L. REV. 43, 103-95 (1990) (suggesting “the educative role of Supreme Court opinions” may be particularly apparent in dissenting opinions).

5 Anthony M. Kennedy, Assoc. Just., U.S. Sup. Ct., Remarks at Harvard Law School (March 11, 2008), in Guinier, supra note 4, at 7. The writings of Aharon Barak, who served as President of the Israeli Supreme Court, suggest that the metaphor’s appeal is not limited to American jurists. See Aharon Barak, Foreword, A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 HARV. L. REV. 19, 38 (2002) (invoking Rostow explicitly and contending that “judges are also educators”).

6 See, e.g., Eisgruber, supra note 3, at 973 (construing the Court’s students as “the American people”); Katyal, supra note 4, at 1720 (construing the Court as “teach[ing] citizens”).

7 See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 422 (2d ed. 2008) (“Only a minority of Americans know what the courts have done on important issues.”).


9 See, e.g., Helen J. Knowles, The Supreme Court as Civic Educator, 6 FIRST AMEND. L. REV. 252, 263 (2008) (“What if the Court holds ‘vital national seminars’ that no one attends?”); Eisgruber, supra note 3, at 999 (“The Supreme Court may indeed conduct a ‘vital national seminar’ although attendance is spotty and few students do the reading.”).
exclusively theoretical plane, no evidence exists for evaluating whether the Court’s ostensible lessons actually have been acquired. Proponents of the educational metaphor, critics maintain, blithely assert that the Court teaches through its opinions without endeavoring to explain with any precision how that educational process transpires.

These two criticisms contain undeniable force. They should not, however, be understood to extinguish the educational metaphor’s utility altogether. In order to appreciate how the educational metaphor retains vitality, it seems advisable to approach the issue from a fresh perspective. Scholars who have thus far explored this matter have overwhelmingly viewed the Supreme Court as a beneficent teacher, a knowledgeable and wise leader who imparts enlightened values on society. Rostow’s initial formulation embodied this exalted notion of the teacher, as he unveiled the metaphor in the context of suggesting that recent Court opinions had taught the nation invaluable lessons on racial equality. For Rostow, these opinions exerted an “immensely constructive influence” in spurring the nation to a richer comprehension of its constitutional and even its “moral” obligations toward Black citizens. Modern scholarship continues to endorse this exalted view, construing the Court as an “inspirational” teacher, one who “leads the people of the United States to a deeper understanding of our constitutional commitments.” When the Supreme Court teaches, this narrative runs, it invariably teaches well.

Not all teaching, however, is good teaching. This Article inverts the standard approach by identifying and analyzing instances when the Supreme Court teaches a lesson, but imparts the lesson badly—instances, that is, when the Supreme Court has been a bad teacher. Bad teaching from the Supreme Court may arrive in a variety of different forms. Some classic examples arguably illustrating distinct types of bad teaching by the Supreme Court spring readily to mind. Brown v. Board of Education II, which ordered desegregation to occur with “all deliberate speed,” might be criticized as bad teaching because it was too lenient. See Brown v. Bd of Educ., 349 U.S. 294, 301 (1955). But see Justin Driver, The Schoolhouse Gate: Public Education, The Supreme Court, and the Battle for the American Mind 256-64 (2018) (arguing that denunciations of Brown II fail to attend to significant historical constraints, and that it is the Court’s silence on school segregation during the Kennedy and Johnson
here, however, concerns what is perhaps the foulest form of all: the teacher who conveys the material in a substantively erroneous fashion. To select an almost painfully simple illustration of the phenomenon I will examine, consider a first-grade teacher who publicly commends a pupil for arriving at the conclusion that $2 + 2 = 5$, a lesson that succeeds only in spreading inaccurate information throughout the class. In a similar vein, the Supreme Court sometimes issues opinions validating unconstitutionally repressive policies, and in the process transmits incorrect lessons about our constitutional order that subsequently become prevalent throughout the nation. In so doing, the Court provides instruction that not only fails to edify, but affirmatively misinforms.

The Supreme Court’s bad teaching can be witnessed by examining the aftermaths of three notable opinions, each arising from a distinct temporal and constitutional context. In *Buck v. Bell*, the Supreme Court authorized Virginia’s compulsory sterilization statute, denying challenges under the Fourteenth Amendment’s Due Process and Equal Protection Clauses. In *Minersville School District v. Gobitis*, the Supreme Court authorized a Pennsylvania school to expel Jehovah’s Witness students for refusing to salute the American flag, rejecting a challenge under the First Amendment. In *New York v. Belton*, the Supreme Court authorized a police officer’s warrantless search of a vehicle when he arrested occupants, rebuffing a challenge under the Fourth Amendment.

Formally, *Buck*, *Gobitis*, and *Belton* merely permitted—and did not require—policymakers to enact compulsory sterilization statutes, adopt mandatory flag salute measures, and execute warrantless searches of vehicles upon arresting motorists. But in the wake of these decisions, all three policies became dramatically more widespread, as the Court’s teachings stimulated successive waves of reform. In all three of these contexts, moreover, the Supreme Court ultimately recognized its bad teaching, by either outright reversing course or dramatically retreating from its prior decisions.

Although the Supreme Court...
can certainly issue opinions teaching bad lessons that it never officially recognizes as such, the Court’s recognition in these three contexts renders them particularly apposite case studies. In surveying these bad teaching moments, this Article rebuts the two primary criticisms of the notion that the Supreme Court possesses the ability to educate. First, in response to the claim that the Court cannot teach because citizens typically do not know its decisions, this Article narrows the frame of inquiry by identifying particular groups within the general populace who possess that knowledge. By focusing on discrete groups of actors relevant to a given case’s constitutional context, it becomes apparent that Supreme Court opinions have in fact taught lessons to some students. In response to Buck, legislators in statehouses around the nation—aided no doubt by the sterilization movement—demonstrated considerable awareness of the Court’s decision by enacting myriad statutes that essentially replicated the Virginia measure.21 Similarly, school administrators throughout the country revealed knowledge of Gobitis when they began expelling Jehovah’s Witnesses for refusing to salute the flag, and justifying those expulsions with the judicial decision.22 Finally, and most intuitively, many police departments relied on Belton when they started instructing officers to conduct warrantless searches on vehicles when arresting motorists.23 Thus, while few Americans may have registered for the Supreme Court’s offering in constitutional law, policymakers within particular fields not only seem to have enrolled in the course, but have also been active participants.

Second, in response to the critique that Court-as-educator theories lack any evidentiary support, this Article provides detailed accounts of how the Court’s opinions in Buck, Gobitis, and Belton imparted bad constitutional lessons. Examined from the perspective of the Court’s actual pupils, these ill-fated opinions can be understood to stimulate learning, emulating, and extrapolating that resulted in the contested measures becoming more widespread. Although this terminology will be developed further below, a brief word of exposition is required here.24 By learning, I mean that the Court’s opinions elevated the measures’ profiles and, in the process, informed some policymakers what measures would be deemed to pass constitutional muster. By emulating, I mean that some policymakers implemented the measures validated by the Court’s opinion because those measures had received the Supreme Court’s imprimatur. By extrapolating, I mean that some


21 Buck, 247 U.S. 200; see infra notes 57–60 and accompanying text.

22 Gobitis, 310 U.S. 586; see infra notes 90–98 and accompanying text.

23 Belton, 453 U.S. 454; see infra notes 117–21 and accompanying text.

24 See infra text accompanying notes 131–42.
policymakers seized the undergirding logic of the Court’s opinions and drew inferences to apply that logic in uncharted terrain.

This terminology incorporates—and elaborates upon—the voluminous political science scholarship exploring the phenomenon it labels “policy diffusion.”25 In this work stretching back to the late 1960s, political scientists have examined how policies spread both domestically (from one state to other states) and internationally (from one nation to other nations).26 While some professors have also deployed the insights of policy diffusion in legal scholarship, they have tended to examine the phenomenon in relatively isolated contexts by, for example, scrutinizing how legal regimes spread from one municipal government to other municipal governments,27 one state legislature to other state legislatures,28 from one state court system to other state court systems,29 and from one country to other countries.30 Yet law review articles exploring federalism and local experimentation have increasingly adopted the policy diffusion framework.31 Somewhat oddly, then,

25 Although political scientists have previously used the terms “learning” and “emulating,” this Article introduces the term “extrapolating” to the policy diffusion literature.


31 For an important, illuminating article that emphasizes the downside of policy diffusion, with particular applications to the world of environmental law, see Michael A. Livermore, The Perils of Experimentation, 126 YALE L.J. 636, 636-708 (2017); and see also Michael Burger, The (Re)Federalization of Fracking Regulation, 2013 MICH. ST. L. REV. 1483, 1488; Brian Galle & Joseph Leahy, Laboratories of Democracy? Policy Innovation in Decentralized Governments, 58 EMORY L.J. 1333.
legal scholarship has yet to examine policy diffusion in a conspicuous setting: how Supreme Court opinions validating state and local measures can prompt other states and localities to adopt those measures. In uncovering the Supreme Court’s underappreciated role in spreading policies throughout the nation, this Article employs an approach it terms integrated policy diffusion. Rather than examining how policies spread within only a single governmental sphere (i.e., from state legislature to state legislature, from state court to state court, or from nation to nation) as is traditional, an integrated approach to policy diffusion requires examining how policies spread due to the dynamic interaction of governmental entities across multiple spheres. As the bad teaching moments in *Buck, Gobitis*, and *Belton* demonstrate, Supreme Court opinions have led policies to become more widely adopted in a variety of governmental contexts: from statehouses to schoolhouses to police stationhouses. This less partitioned, more holistic approach to policy diffusion offers insight into not only how Supreme Court opinions actually operate, but into how legal institutions interact more broadly.

Examining the Supreme Court’s teaching from this unconventional vantage point—where the Court has taught badly—has the additional virtue of better positioning scholars to glimpse instances when the Supreme Court has taught well. Just as the Court teaches badly when it aids constitutionally undesirable policies in becoming more widespread by issuing opinions that validate those policies, the Court can be viewed as teaching well when it leads constitutionally desirable policies to become more widespread by issuing opinions that validate those policies. Thus, in *Ginsberg v. New York*, the Supreme Court taught well by upholding a variable obscenity statute that was drawn in very narrow terms, making it clear what sorts of pornographic materials could be sold to adults without incident but were prohibited from being sold to minors. Accordingly, when many jurisdictions utilized New York’s measure as a model statute for their own variable obscenity legislation after *Ginsberg*, they also enacted narrowly drawn measures that imposed minimal burdens on the freedom of expression.

The *Ginsberg* lesson has proved lasting as the Court has never retreated from the decision, and the variable obscenity measures it inspired remain in place today. In addition, the Supreme Court can be viewed as teaching well when it engages in the opposite of policy diffusion: by invalidating ill-conceived, unconstitutional
measures found in states and localities, a practice this article labels policy suppression. When it deems certain measures beyond the nation’s constitutional bounds, the Court transmits the important lesson that—even if majorities wish to enact particular measures—those measures may nevertheless be impermissible. This practice of suppressing unconstitutional measures, of course, accounts for many of the Court’s finest moments in its history, ranging from Loving v. Virginia’s invalidation of interracial marriage bans\textsuperscript{34} to Romer v. Evans’s invalidation of a statewide effort to exclude sexual orientation from the reach of local antidiscrimination laws.\textsuperscript{35} The Court’s lessons in these cases—and many others besides—have also proved durable, as the institution has stood by and reaffirmed the suppression of such unconstitutional policies.

Understanding that the Supreme Court can meaningfully be viewed as teaching—both for worse and for better—not only fortifies the much-maligned educational metaphor, but it also recasts high-profile legal debates within the modern era. First, contrary to leading academic theories asserting that the Court interprets the Constitution merely to amplify the nation’s consensus beliefs, highlighting the Court’s teaching capacity makes clear that the Justices often possess more latitude to issue a wide range of opinions than such theories allow. Although consensus-based theories suggest scholars ignore historical context when they either celebrate or condemn judicial opinions from earlier eras, the existence of judicial latitude demonstrates the propriety of criticizing the Court for teaching badly and of commending it for teaching well. Second, contrary to influential theories suggesting social reform movements should avoid litigation in favor of legislation, recovering the Court’s teaching role accentuates the fact that victories in the judicial arena sometimes transfer into the legislative arena. The Supreme Court’s ample teaching capacity establishes that claims holding the Court is too fragile an institution to play a significant role in shaping society must be reassessed. Finally, reclaiming the Court-as-teacher notion should not be dismissed as a project that is divorced from law’s substance; rather, as Supreme Court Justices and prominent law professors have repeatedly recognized, legal metaphors matter precisely because they influence and inform substantive legal outcomes.\textsuperscript{36}

The balance of this Article proceeds as follows. Part I provides the background details establishing that the Supreme Court taught badly by issuing opinions that aided the spread of measures authorizing compulsory sterilizations, compulsory flag salutes, and warrantless vehicle searches. Part

\textsuperscript{34} See 388 U.S. 1, 12 (1967).
\textsuperscript{36} See infra text accompanying notes 301–13.
II demonstrates how the Court’s opinions in *Buck, Gobitis,* and *Belton* can all be construed as having stimulated policymakers to learn, emulate, and extrapolate lessons from those opinions. With the Court’s potential for bad teaching established, Part III then pivots to reconceive how the Court might be considered a good teacher, illustrating how the Court has both boosted measures that promote constitutional values and suppressed measures that damage constitutional values. Turning to consider implications, Part IV evaluates how reconceiving the Court as a teacher complicates prominent theories within modern legal scholarship that offer unduly anemic views of the judiciary’s capacity to shape society, and also highlights the significance of metaphors within legal discourse. A brief conclusion follows.

Before delving into the argument further, it is necessary to provide two explanatory notes. First, my selection of judicial opinions to illustrate the Court teaching badly and teaching admirably involves both descriptive and normative elements. As to the descriptive element, the opinions analyzed herein all comport with what can be deemed the Supreme Court’s own, ongoing assessment of whether its opinions embodied bad lessons or good lessons. The opinions exemplifying bad teaching all witnessed the Court subsequently reverse or dramatically retreat from those precedents, suggesting that those earlier decisions contained incorrect substantive views. The opinions exemplifying good teaching, moreover, have all witnessed the Court stand steadfast by those precedents, suggesting that those decisions contained correct substantive views. As to the normative element, the opinions I have selected to exemplify bad teaching and good teaching also comport with my own constitutional understandings. These normative constitutional commitments are in no way idiosyncratic. To the contrary, each of them is reflected in current constitutional doctrine. Still, it seems advisable to acknowledge in a forthright manner that what makes for “bad” and “good” constitutional teaching unmistakably involves normativity.

The second explanatory note addresses the limited scope of my claim regarding the Court’s capacity for teaching. While the opinions analyzed herein are illustrative rather than exhaustive of the Court’s educational function, I am in no way contending that the Court’s opinions *invariably* teach lessons. My ambitions here are more modest; I aim to demonstrate merely that the Court *sometimes,* both for ill and for good, has in fact taught.37 For the Court to teach effectively, segments of the public must be at least somewhat receptive to the lessons it imparts. Of course, to the extent that this statement suggests only that, in order for the Court to teach, underlying

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37 Cf. Eisgruber, *supra* note 3, at 965 (“[T]he Court teaches only rarely.”); id. at 1002 (“The Court teaches part-time—in fact, rarely—if at all.”).
conditions must be conducive to that endeavor, it is a statement that teachers in actual classrooms across the nation would heartily endorse.

I. BACKGROUND

This Part identifies and explores four successive background phases indicating that the Supreme Court has potentially acted as a bad teacher. First, legal uncertainty clouds what policies governmental entities may adopt to address a particular concern without violating the Constitution. Second, the Supreme Court eliminates this uncertainty by issuing an opinion that validates the constitutionality of a particular policy. Third, the Court-validated policy spreads throughout the nation. Fourth, the Supreme Court reverses course in an area by either overturning its prior decision outright or dramatically retreating from its earlier opinion. This Part chronicles each of these four successive stages with respect to three different legal controversies: compulsory sterilization, flag salute requirements, and warrantless searches of vehicles upon arresting occupants.

A. Sterilizations

When the Supreme Court weighed the constitutionality of Virginia’s compulsory sterilization law in Buck v. Bell in 1927, it did so against a legal backdrop that cast substantial doubt on the permissibility of such measures. Although the eugenics movement succeeded in convincing several state legislatures to pass sterilization bills during the early twentieth century, those successes almost always proved ephemeral. Governors in at least five states vetoed sterilization bills, and courts in at least seven additional states invalidated sterilization statutes, citing various legal infirmities. Even in states where compulsory sterilization technically remained available on the books, physicians performed very few such surgeries because the nebulous

38 Focusing upon measures that become more widespread after the Supreme Court issues an opinion validating the measure results in some cases being excluded from examination that may seem to cry out for treatment in an article examining bad constitutional teaching at the Supreme Court. To take one example, the Court validated antisodomy statutes in Bowers v. Hardwick in 1986, and then reversed course in Lawrence v. Texas seventeen years later. Bowers is surely one of the most reviled opinions that the Supreme Court has issued in recent decades and might be presumed an ideal candidate for treatment in this project. Nevertheless, the Court’s opinion in Bowers—odious though it was—did not result in more states enacting antisodomy statutes. To the contrary, after Bowers, many states rejected their existing antisodomy provisions; twenty-five states had antisodomy provisions in 1986, and only thirteen states retained those measures when the Court decided Lawrence in 2003. See Lawrence v. Texas, 539 U.S. 558, 573 (2003).
legal environment led both surgeons and institutional administrators alike to fear criminal prosecution. The lone exception to this trend was California, which accounted for the majority of sterilization procedures before the late-1920s. According to leading historians of sterilization, this state of affairs left the sterilization movement “hobbled” and “frustrated at the legal impasse.” Before the Court issued *Buck*, both proponents and opponents of compulsory sterilization detected signs that the movement was flagging. By 1923, one observer concluded: “[E]ugenical sterilization laws are gradually losing interest for the public, and to some extent at least for professed eugenicists.” In 1926, just one year before the Court’s opinion in *Buck*, Clarence Darrow dismissed compulsory sterilization proponents as a “cult” of “irresponsible fanatics.”

In *Buck*, Justice Oliver Wendell Holmes’s opinion for the Court, joined by seven other justices, suggested that rumors of the sterilization movement’s demise had been greatly exaggerated. Carrie Buck, a patient in a state-run institution for the “feeble minded,” challenged Virginia’s authority to sterilize her under the Fourteenth Amendment’s Due Process and Equal Protection Clauses. In upholding the statute, Justice Holmes emphasized the elaborate procedural mechanisms that Virginia imposed before an involuntary sterilization could occur. In addition to providing targeted individuals and their guardians with notice, Virginia’s statute required a hearing to be held (where all evidence would be reduced to writing), and also afforded multiple opportunities for appeal. Such “very careful provisions by which the act protects the patient from possible abuse,” Holmes wrote, discharged Virginia’s Due Process obligations. Holmes made short work of Buck’s Equal Protection claim—which noted the law applied exclusively to residents of certain state institutions, not to the population at large—by deriding it as “the

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43 Id. at 28.
45 See id.
48 Buck v. Bell, 274 U.S. 200, 207 (1927). Justice Butler dissented, but he did not write an opinion to explain his view. Id. at 208.
49 Id. at 205.
50 Id. at 205-06.
51 Id. at 206.
usual last resort of constitutional arguments."\textsuperscript{52} In his extrajudicial writings prior to \textit{Buck}, Holmes expressed the hearty support for eugenics that was common among Progressives.\textsuperscript{53} It comes as little surprise, then, that Holmes's eugenics enthusiasm appeared on the face of \textit{Buck} itself. Holmes did not uphold Virginia's statute by offering his characteristic odes to judicial restraint and democratic deference. Instead, Holmes endorsed sterilization as a desirable policy "to prevent our being swamped with incompetence."\textsuperscript{54} Holmes continued: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."\textsuperscript{55} Drawing upon findings that both Buck's mother and young daughter were also mentally deficient, Holmes famously distilled his support for sterilization into a sentence containing a mere six devastating words: "Three generations of imbeciles are enough."\textsuperscript{56}

Writing in the wake of \textit{Buck}, J.H. Landman—a prominent contemporaneous student of sterilization—predicted that sterilization would become more widespread: "With such official sanction it will not be long before many states will enact similar legislation."\textsuperscript{57} Landman's prediction proved accurate in short order, as a flurry of legislative activity followed \textit{Buck}. As the authors of a comprehensive analysis of compulsory sterilization laws explained in 2013: "\textit{Buck v. Bell} opened the floodgates. With the green light to coerced sterilization provided by the U.S. Supreme Court in 1927, almost thirty American states either initiated or consolidated their own legislation on coerced sterilization."\textsuperscript{58} Apart from this surge in legislation, moreover, the number of compulsory sterilizations performed nationally per year increased dramatically after \textit{Buck}, peaking in the 1930s at nearly ten times the number

\textsuperscript{52} Id. at 208. For an insightful critique of Justice Holmes's misleading account of the Supreme Court's Equal Protection Clause jurisprudence, see Stephen A. Siegel, \textit{Justice Holmes, Buck v. Bell, and the History of Equal Protection}, 90 MINN. L. REV. 106 (2005).

\textsuperscript{53} See NOURSE, supra note 41, at 30-31.

\textsuperscript{54} \textit{Buck}, 274 U.S. at 207; see Oliver Wendell Holmes, \textit{Ideals and Doubts}, 10 ILL. L. REV. 1, 3 (1915) (noting that "trying to build a race" was his "starting point for an ideal for the law."). For more evidence of Holmes's support for eugenics, see G. EDWARD WHITE, \textit{JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF} 407-08, 572 n.135 (1993).

\textsuperscript{55} \textit{Buck}, 274 U.S. at 207.

\textsuperscript{56} Id. The findings of mental deficiency that Holmes relied upon to classify the Bucks "imbeciles" turned out to be erroneous in all three instances. See generally PAUL A. LOMBARDO, \textit{THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL} (2008). For a compelling account of \textit{Buck v. Bell} that is aimed at a general audience, see ADAM COHEN, \textit{IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK} (2017).


performed just a few years earlier. With doubts regarding the constitutionality of sterilization statutes erased, state administrators became less hesitant about ordering the operations and physicians became more comfortable performing them.

Finally, the Court’s opinion in *Skinner v. Oklahoma* in 1942 represented a dramatic retreat from the pro-sterilization message it communicated fifteen years earlier in *Buck*. In *Skinner*, the Court assessed the constitutionality of a measure that would sterilize criminal offenders upon their third felony conviction for crimes of moral turpitude. The Oklahoma legislature enacted the statute on the eugenics-based justification that crime, like feeble-mindedness, was hereditary. Justice William Douglas’s opinion for the Court invalidated the Oklahoma measure, holding that its uneven designation of crimes involving moral turpitude violated the Equal Protection Clause.

*Skinner*, to be sure, did not formally overrule *Buck*. Indeed, some passages in *Skinner* appear to hold out the possibility that the two opinions are somehow compatible. Nevertheless, the opinions contain profoundly conflicting views of compulsory sterilization measures. *Skinner’s* opening sentences capture the sharp tonal shift in the Court’s attitude toward sterilization from *Buck*: “This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.” Although *Buck* involved precisely the same basic right, one would search Justice Holmes’s opinion in vain for such allowances. The Court’s marked shift in its attitude toward compulsory sterilization is further evident from *Skinner’s* announcement that it would apply “strict scrutiny” to review sterilization legislation. *Skinner’s* application of “strict scrutiny,” the first time that phrase

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59 See *LARSON*, supra note 42, at 28.
60 See *HANSEN & KING*, supra note 58, at 115. For a discussion of *Buck*, the opinion’s political consequences, and the federalism dynamics surrounding the eugenics movement, see *JEFFREY S. SUTTON*, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 4-5, 84-120 (2018) (“The aftermath of *Buck* demonstrates what happens if Americans rely too heavily on just one of those courts, the U.S. Supreme Court, as the exclusive guardian of our rights . . . .”).
63 See 316 U.S. at 541-42 (noting the statutory oddity that common theft involved moral turpitude, but that embezzlement did not).
64 See *SUTTON*, supra note 60, at 124 (noting *Skinner* undermined the eugenics movement even though it “left *Buck* on the books”).
65 See 316 U.S. at 542 (suggesting compatibility with *Buck*).
66 Id. at 536. For similar views in *Skinner*, see id. at 541 (“We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”).
67 Id.
ever appeared in the U.S. Reports, can be understood as replacing Buck’s gentle glance. Where Justice Holmes in Buck emphasized how much society stood to benefit from compulsory sterilization, Justice Douglas in Skinner highlighted how much both society and the individual targeted for sterilization stood to lose from such legislation. “The power to sterilize, if exercised, may have subtle, far reaching and devastating effects,” Justice Douglas wrote. “In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches . . . . He is forever deprived of a basic liberty.”

Skinner did not immediately eliminate all compulsory sterilization in the United States, but it cannot be understood as signaling anything less than a sea-change in the Court’s assessment of the wisdom contained in such legislation.

B. Salutes

When the Supreme Court decided Minersville School District v. Gobitis in 1940, at least some ambiguity surrounded whether the Constitution permitted public schools to expel students for refusing to salute the American flag. The issue arose because Jehovah’s Witnesses felt that participating in the flag salute ceremony violated a biblical commandment, and accordingly they argued that salute mandates hindered their First Amendment free exercise rights. During the five-year period prior to Gobitis, Jehovah’s Witnesses litigated the issue repeatedly around the country, but sustained a series of lower court defeats. The Supreme Court consistently refused to hear oral argument in these cases, in effect permitting the expulsions to stand. Some courts before Gobitis did, however, hold that flag salute requirements violated the constitutional rights of Jehovah’s Witnesses. In 1937, an intermediate court in California vindicated the constitutional claim in the first favorable written opinion on the flag salute issue. But the California Supreme Court reversed that opinion one year later. That same year, though, a federal

68 Nourse, supra note 41, at 152 (observing Skinner’s innovation).
69 Skinner, 316 U.S. at 541.
70 See Nourse, supra note 41, at 158-59 (assessing Skinner’s legacy).
71 310 U.S. 586 (1940).
72 See Exodus 20:3-5 (King James) (“Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above . . . [and] thou shalt not bow down thyself to them, nor serve them . . . .”).
73 See David R. Manwaring, Render Unto Caesar: The Flag Salute Controversy 56-80 (1962).
74 See id.
76 Gabrielli, 82 P.2d 391.
district court judge in Pennsylvania determined that a local school district could not expel Jehovah’s Witnesses without violating the First Amendment. In 1939, a unanimous panel on the U.S. Court of Appeals for the Third Circuit affirmed the district court’s opinion. During this pre-Gobitis era, furthermore, major law reviews published items casting considerable doubt on the constitutionality of permitting schools to expel students for refusing to salute the flag. The legality of flag salute requirements was sufficiently hazy prior to Gobitis that the Attorney General of Washington State ordered school officials to refrain from expelling non-saluting students who cited their religious scruples.

In Gobitis, Justice Felix Frankfurter’s opinion for the Court upheld the constitutionality of public schools that expelled students for failing to salute the American flag. Unusually close readers of Gobitis may have noticed that Justice Frankfurter appeared to evince at least some skepticism regarding the wisdom of imposing flag-salute requirements on all students. As Frankfurter expressed the point obliquely: “For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crotchety beliefs. Perhaps it is best . . . to give to the least popular sect leave from conformities like those here in issue.” Whatever temptation the Justices experienced in Gobitis, Frankfurter explained, they resisted because questions of this sort belonged to educators, not judges. Apart from a few isolated passages, though, Frankfurter’s opinion generally reads as though it endorses flag salute requirements because of the colossal importance of fostering national cohesion. “We are dealing with an interest inferior to none in the hierarchy of legal values,” Frankfurter explained. “National unity is the basis of national security.” Frankfurter received the assignment to write Gobitis because of the zealous appeal to patriotism that he delivered in conference. That zeal was on full display in Gobitis, as he deemed national

79 See, e.g., Note, Compulsory Flag Salute and Religious Freedom, 51 HARV. L. REV. 1418 (1938); Recent Case, Power of the School Board to Compel Pupil to Salute Flag, 86 U. PA. L. REV. 431 (1938).
80 See MANWARING, supra note 73, at 188.
82 Id. at 598.
83 See id. (“[T]he courtroom is not the arena for debating issues of educational policy.”); id. (invalidating the measure “would in effect make us the school board for the country”); id. at 597-98 (contending that, in the field of education, “courts possess no marked and certainly no controlling competence”). For a claim that public schools have served as the preeminent site of constitutional interpretation, see DRIVER, supra note 15, at 9.
84 Gobitis, 310 U.S. at 595.
85 Id.
cohesion “[t]he ultimate foundation of a free society,” and a link between
generations that creates “a treasured common life which constitutes a
civilization.” Building on this rhetorical crescendo, Frankfurter proceeded
to quote a favorite statement from his judicial hero, Justice Holmes. “We live
by symbols,” Frankfurter wrote. “The flag is the symbol of our national
unity, transcending all internal differences, however large, within the
framework of the Constitution.” Given these sorts of sweeping
proclamations, it might have seemed not merely constitutionally permissible
but necessary for school authorities to introduce flag salute requirements.

Following Gobitis, the practice of expelling Jehovah’s Witness students for
refusing to salute the American flag spread throughout the entire country. In 1940, the year Gobitis was decided, students in fifteen different states either had been or were in the process of being expelled due to the saluting controversy. Just three years later, though, expulsions had occurred in every one of the nation’s forty-eight states. Some of these expulsions could be traced to the adoption of post-Gobitis measures enacted by state legislatures, state boards of education, municipal governments, and local school boards. Other expulsions were attributable not to new statutes, but instead to novel, more aggressive interpretations of extant statutes. Predictably, the overall number of flag-related expulsions also skyrocketed after Gobitis. David Manwaring, a leading authority on the Court’s flag salute cases, has noted that the “[m]ost immediately striking” aspect of the five-year period before Gobitis “is the relatively small number of total expulsions.” Manwaring does not provide a precise number of expulsions, but he does disclose that only two states during this era expelled more than ten students. By 1943,
Manwaring notes that the number of flag-related expulsions had ballooned to exceed more than two thousand students, giving each of the forty-eight states an average of more than forty expulsions.98

In 1943, after the compulsory flag salute requirements spread nationally, the Supreme Court explicitly reversed course, overturning the measures in West Virginia State Board of Education v. Barnette.99 At times, Justice Robert Jackson's opinion for the Court amounts to a point-by-point rebuttal of Gobitis. Where Justice Frankfurter had emphasized the limits of judicial knowledge within the educational arena, Justice Jackson emphasized that "modest estimates of our competence in . . . public education" should not lead the Court to abdicate its constitutional responsibilities.100 Jackson further insisted, contra Frankfurter, that threats could not foster national cohesion: "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."101 Next, Jackson laid his own claim to the mantle of patriotism by suggesting that requirements to salute the American flag were themselves, in a very real sense, un-American.102 "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," Jackson wrote.103 From a doctrinal perspective, Justice Jackson's most important contribution in Barnette lay in his reconceptualization of the harm Jehovah's Witnesses sought to avoid in resisting compulsory flag salute measures. Instead of conceiving the measures as primarily inhibiting the First Amendment's freedom of religion, Justice Jackson instead focused on how the measures constrained the First Amendment's freedom of expression. By forcing Jehovah's Witnesses to salute the American flag upon penalty of expulsion, Jackson reasoned, the state impeded their freedom of speech, which involves a corresponding right not to speak.104 But whatever Barnette's precise constitutional reasoning, the

98 See id. at 187.
100 Id. at 640.
101 Id. at 642.
102 This portion of Barnette maps onto Philip Bobbitt's "ethical" modality of constitutional interpretation. See PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 93-119 (1982) (explaining that arguments from ethos appeal to constitutive claims about the nation and its traditions).
103 Barnette, 319 U.S. at 642. This statement is among the most luminous, most powerful in the Court's entire history.
104 See id. at 634 ("To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."). For a helpful examination of constitutional rights and their negative corresponding rights, see Joseph Blocher, Rights To and Not To, 100 CALIF. L. REV. 761 (2012).
opinion prohibited public schools across the country from expelling Jehovah’s Witnesses for adhering to their religious principles.

C. Searches

When the Supreme Court decided New York v. Belton in 1981, considerable confusion attended the question of how extensively the Fourth Amendment permitted police officers lacking a warrant to search an automobile when lawfully arresting one of its occupants. Twelve years earlier, in Chimel v. California, the Court held that an officer who arrests someone inside a home could not proceed to search the house in its entirety, but instead was limited to searching the arrestee and the area “within his immediate control.” Chimel defined that phrase to mean “the area from within which [the arrestee] might gain possession of a weapon or destructible evidence.” The importation of Chimel’s “immediate control” concept into the vehicle context raised two crucial questions for police departments, and ultimately for judges. First, does the Fourth Amendment’s prohibition on unreasonable searches permit officers to search a vehicle’s entire passenger compartment when conducting an arrest? Second, does the answer to that first question hinge on the reason for the underlying arrest? During the twelve years between Chimel and Belton, lower courts answered those queries with a dizzying range of responses. Some courts gave officers free rein to search a car’s passenger compartment when conducting an arrest. Other courts, in contrast, concluded that searching a car pursuant to an arrest violated the Fourth Amendment. Still other courts concluded the Fourth Amendment prohibited officers from searching a vehicle if the arresting offense involved a garden-variety traffic violation, reasoning that there would be no basis for believing that a search in those circumstances would uncover a weapon or evidence of another crime. In sum, as

107 Id.
108 See, e.g., United States v. Sanders, 631 F.2d 1309 (8th Cir. 1980); United States v. Dixon, 558 F.2d 919 (9th Cir. 1977).
109 See, e.g., United States v. Benson, 631 F.2d 1336 (8th Cir. 1980); United States v. Rigales, 630 F.2d 364 (5th Cir. 1980). One article surveyed the legal landscape of these circuits, and described it as a majority rule:

After Chimel, once an arrestee has left the car and is under control, it would not appear that the vehicle is within his immediate control any more than the bedroom of an individual who was arrested in his living room is within that individual’s immediate control. Most courts agree that a car may not be searched incident to arrest after . . . the arrestee has been removed from the vehicle.

110 See V.A. LEONARD, THE POLICE, THE JUDICIARY, AND THE CRIMINAL, 72 (1969) (“A number of case decisions indicate that the officer has no right to search either the occupants of a car
the Supreme Court in Belton would eventually concede, federal courts of appeals encountered serious “difficulty” applying Chimel’s standard to automobiles, and the state courts were “in similar disarray.”\footnote{See id. at 460.}

In Belton, Justice Potter Stewart’s opinion for the Court sought to eliminate this confusion by articulating a bright-line rule authorizing police officers to conduct comprehensive searches of automobiles when they arrest an occupant.\footnote{Id. at 458 (quoting Wayne R. LaFave, “Case-By-Case Adjudication” Versus “Standardized Procedures”: The Robinson Dilemma, 1974 SUP. CT. REV. 127, 142).} In reaching this conclusion, Justice Stewart explicitly invoked legal scholarship advising the Court to interpret the Fourth Amendment in a manner that provided clear guidance to police officers and thus avoided the need for making fact-sensitive determinations mired in ambiguity. Quoting extensively from an academic article, Stewart noted, “‘Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police.’”\footnote{Id. at 451.} Accordingly, Stewart continued, Fourth Amendment opinions should eschew regulatory guidance “‘qualified by all sorts of ifs, ands, and buts,’” and that requires implementing officers to draw “‘subtle nuances and hairline distinctions.’”\footnote{Id. at 451.} In an effort to craft “the workable rule this category of cases requires,” Justice Stewart wrote: “[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”\footnote{See id. at 451.} Belton proceeded to specify that this holding authorized arresting officers to search any container within the vehicle’s passenger compartment, including any articles or items within luggage and clothing.\footnote{See id. at 460.}

After Belton, not surprisingly, the practice of police officers automatically conducting comprehensive warrantless searches of automobiles when they arrested an occupant spread throughout the nation. It is impossible to state with anything approaching precision how many police departments followed Belton-style protocol prior to 1981.\footnote{See Myron Moskovitz, A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton, 2002 WIS. L. REV. 657, 665-67 (noting the myriad difficulties of surveying actual police practices).} Apart from the issue of aggregating the many disparate approaches, police departments tend not to publicize the
contents of their training manuals, lest they fall into lawless hands.\textsuperscript{118} Nonetheless, evidence supports the idea that Belton created a new status quo and did not merely memorialize the existing status quo. As the Court itself recognized, many jurisdictions understood Chimel to afford police far less latitude to conduct searches than Belton permitted.\textsuperscript{119} In contemporaneous commentary, moreover, the Washington Post deemed Belton “a major departure,”\textsuperscript{120} an assessment with which leading legal scholars appeared to agree. Law professors roundly excoriated Belton because they viewed the opinion as insufficiently protective of the privacy interests that animated Chimel, and because it could be understood as veritably inviting police officers to arrest motorists on pretextual grounds in order to engage in otherwise impermissible searches.\textsuperscript{121} Whatever the precise breakdown of police practices regarding automotive searches before Belton, it requires no great imagination to understand why the Belton rule would have become virtually universal in its wake. Police departments would have strong incentives to conform their training methods to align with Belton because the decision represented a powerful investigatory weapon in the law enforcement arsenal.

Finally, twenty-eight years after Belton, the Court disavowed its bright-line rule in Arizona v. Gant in 2009.\textsuperscript{122} In Gant, police officers arrested a motorist for driving with a suspended license, and then discovered cocaine and a firearm within the car when they conducted a Belton-style search.\textsuperscript{123} Writing on behalf of the Court, Justice John Paul Stevens determined that the search violated the Fourth Amendment, and acknowledged criticism that Belton seemed to confer police officers with unfettered discretion to initiate exploratory searches.\textsuperscript{124} Adopting a case-by-case analysis, Justice Stevens held that arresting officers were permitted to search the entire passenger compartment provided they could reasonably conclude evidence related to the crime of arrest might be located in the automobile.\textsuperscript{125} “In many cases, as when a recent occupant is arrested for a traffic violation, there will be no

\textsuperscript{118} See id. at 663.

\textsuperscript{119} See supra text accompanying notes 108–11.


\textsuperscript{122} See 556 U.S. 332 (2009).

\textsuperscript{123} See id. at 336.

\textsuperscript{124} See id. at 350–51.

\textsuperscript{125} See id. at 346.
reasonable basis to believe the vehicle contains relevant evidence,” Justice Stevens wrote.126 “But in others . . . the offense of arrest will supply a basis for searching the passenger compartments of an arrestee’s vehicle and any containers therein.”127 Although Gant did not explicitly announce that it was overruling Belton, the opinion required police officers to engage in precisely the sort of fact-dependent inquiries that Belton had rejected, analysis predicated on “ifs, ands, and buts.”128 Legal commentators have thus widely concluded Gant “effectively overruled” Belton, even if it did not formally do so.129

II. EXPLORATIONS

This Part explores how the Supreme Court can be understood to have acted as a bad teacher in issuing Buck v. Bell, Minersville School District v. Gobitis, and New York v. Belton.130 In each case, the Supreme Court entertained a constitutional challenge to a contested practice, and issued an opinion affirming the practice’s validity. In so doing, the Court can be viewed as teaching badly by elevating the salience of a particular legal issue and assisting a misguided constitutional understanding to spread throughout the nation. The Court’s opinions in these three cases played a significant pedagogical role in stimulating various students to undertake various efforts that turned out to be misguided. On this conception, the Court’s students should not be construed as comprising the nation’s entire population, as Rostow posited, but instead as discrete subpopulations that pay careful attention to narrow aspects of the Court’s jurisprudence.

This Part—which both extends and advances the phenomenon political scientists have labeled “policy diffusion”131—examines three distinct manners in which these students have utilized the Court’s bad teachings: learning, emulating, and extrapolating. Before delving into extended explanations of how

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126 Id. at 343.
127 Id. at 344.
128 New York v. Belton, 453 U.S. 454, 458 (1981) (internal quotation marks omitted). One of the reasons that Justice Stevens’s opinion in Gant may have sought to preserve rather than reject Belton could be owed to the fact that he joined the Belton majority in 1981, and he wished to preserve his reputation for voting consistently. For an argument that Justice Stevens and legal culture more broadly exhibit excessive concern with judicial consistency, see Justin Driver, Judicial Inconsistency as Virtue: The Case of Justice Stevens, 99 GEO. L.J. 1263 (2011).
these three mechanisms appeared in the context of compulsory sterilization, flag salute mandates, and automobile searches, it is necessary to provide a theoretical overview of these phenomena, and to explain how they can profitably be applied to the Supreme Court’s role in American society.

First, when students learn from a bad Supreme Court decision upholding a challenged practice, they comprehend what policies will pass constitutional muster. Political scientists, in the context of exploring how a policy spreads among states, have observed that when policymakers attempt to address a common problem they seek to avoid reinventing the wheel. Instead, policymakers survey the existing efforts to remedy the problem, and then select an approach that has proved successful in another state. Here, in the context of learning from Supreme Court opinions, the measure for deeming a policy “successful” boils down to whether the Court would validate a policy’s constitutionality. At the risk of stating the obvious in a paper emphasizing the Supreme Court’s penchant for bad teaching, policies that are adjudged successful in terms of constitutionality may well be deemed markedly, spectacularly unsuccessful when measured along other axes—including the capacity to promote fundamental values such as liberty, equality, and privacy.

Stephen Wasby expressed a modest version of this learning point many years ago, when he wrote: “When the Court upholds a law, particularly one little used, lawyers may awaken to its possibilities.” This phenomenon, of course, cannot be confined to lawyers, as various Supreme Court opinions roused into action a range of groups including: state legislators, city council members, interest group activists, state hospital administrators, teachers, school administrators, and police officers.

133 Id.
134 Id. at 841.
136 Some legal scholarship has suggested that citizens should be viewed as learning from Supreme Court opinions if they “changed their positions” on questions to follow the Court’s newly articulated view. See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 464 (2004). While this notion certainly presents a dramatic conception of learning from a judicial opinion, it is hardly the only notion that the term can be viewed as containing. Nor is this about-face notion of learning even necessarily the most obvious usage of that term. To appreciate the point, consider an example from the law school curriculum. When first-year students say that they learned the concept of consideration in contracts, it seems improbable that they mean to suggest that the instructor “changed their positions” on the concept. It seems likely that most students had no position on the concept of consideration one way or another. When students state that they learned consideration, they instead mean that they acquired new knowledge about what would be required to form an enforceable contract. This idea of learning—i.e., learning what works—is akin to the notion of learning—i.e., learning what is constitutional—employed in this Article.
Second, when students emulate the Supreme Court’s validation of a bad policy, they adopt a particular measure precisely because it conforms to a measure that has received endorsement from the nation’s highest Court. In the policy diffusion context, political scientists have observed that states sometimes adopt policies, not because they value those policies intrinsically, but because they admire a state that currently features the policy. It is helpful to understand this concept by contrasting the notion of emulating with that of learning. As political scientists have expressed that contrast: “The crucial distinction is that learning focuses on the action (i.e., the policy being adopted by another government), while [emulation] focuses on the actor (i.e., the other government that is adopting the policy).” Here, in considering emulation within the Court-as-educator analogy, the relevant actor held in high esteem is not some neighboring state or locality that has adopted a particular policy, but instead it is the Supreme Court itself, which as a revered institution has placed its imprimatur on that policy. Robert Dahl captured this emulation power well when he contended that “the most important” power the Supreme Court possesses “is the unique legitimacy attributed to its interpretations of the Constitution.”

Third, when students extrapolate from a bad Supreme Court decision, they take actions and form policies by making inferential leaps based upon their knowledge of the Court’s previous decision. In other words, to employ the mathematics terminology from which extrapolation borrows its moniker, students use a known data set to develop conjectural understandings of unknown data. The extrapolation concept may also be better grasped when it is juxtaposed with learning. After students learn from the Court’s opinion what measures have been deemed constitutionally successful, they can then extrapolate further-reaching measures that the opinion may also be projected to validate. Extrapolation represents a significant, though underexplored, mechanism by which policies proliferate, particularly in the judicial context.


138 Political scientists use different labels to refer to this same phenomenon. See Shipan & Volden, supra note 132, at 842 (noting “emulation” is sometimes labeled “imitation”). For a sophisticated treatment of this phenomenon in the international law context, see GOODMAN & JINKS, supra note 30. For a discussion of the relationship between partisanship and emulation, see Daniel M. Butler & Miguel M. Pereira, TRENDS: How Does Partisanship Influence Policy Diffusion?, 71 POL. RESQ. 801, 809 (2018).

139 See Shipan & Volden, supra note 132, at 842.

140 Id. at 842-43.

Supreme Court opinions that uphold contested measures often serve as a focal point for policymakers seeking to extend the validated measure’s underlying principles into uncharted terrain. Professor Louis Warsoff captured this extrapolation dynamic vividly in the late-1930s when he suggested that “a decision upholding a piece of legislation does not merely assert the validity of the statute up for consideration, but blazes the path for further effort in the same direction.”

At the outset, it is important to acknowledge that the lines dividing these three mechanisms from one another are often cleaner as a matter of theory than in reality. Whenever the Supreme Court issues an opinion upholding a state or local measure, polities lacking the measure have the opportunity simultaneously to: learn what policy has been successful, emulate the policy in light of the Court’s imprimatur, and extrapolate from the Court-validated policy to take additional steps. At times, determining precisely where, say, learning ends and emulation begins can be an extremely difficult task.

Despite such difficulties, however, distinguishing among these three mechanisms through which students respond to the Supreme Court’s teachings constitutes a worthwhile endeavor. Identifying three mechanisms, even in idealized forms, through which various actors implement the Court’s lessons should yield greater linguistic and analytical clarity within constitutional discourse. Some of the considerable confusion that currently surrounds the Court’s teaching role may stem from the lack of a common vocabulary for referring to what are three distinct concepts. Developing a common vocabulary could lift this fog of confusion, enabling academic disputes about the educational metaphor to identify with increased clarity the grounds of agreement and of disagreement. Even if scholars hold competing views regarding whether a particular piece of evidence most strongly demonstrates elements of learning, emulation, or extrapolation, such disagreement should not present cause for great alarm. If anything, such disagreements should be welcomed as signs of progress. Those disagreements would indicate that scholars are engaging the Court’s educational capacities with a degree of depth and nuance that discussions of this topic have seldom contained.

142 Louis A. Warsoff, The Judicial Veto, 27 KY. L.J. 45, 72 (1939); see BICKEL, supra note 4, at 130-31 (“Declarations of constitutionality—or, if the reader can stand it, of ‘non-unconstitutionality’—have not only contemporaneous results, but also portentous aftermaths. . . . Today’s declaration of constitutionality will not only tip today’s political balance but may add impetus to the next generations’ choice of one policy over another.”).

143 Cf. Shipan & Volden, supra note 132, at 843-44 (acknowledging difficulties distinguishing among learning, competition, and imitation).
A. Learning

This Section explores how various groups learned what policies would pass constitutional muster from misguided Supreme Court opinions.

1. Sterilizations

The Court’s opinion in *Buck v. Bell* received widespread media coverage when it was issued in 1927, with several prominent newspapers featuring the story on their front pages. Many of the articles reprinted quotations from Justice Holmes’s evocatively written opinion, including his epigram: “Three generations of imbeciles are enough.” To the extent that journalists offered normative views of compulsory sterilization, their reactions were generally favorable. *Buck*’s extensive media coverage is significant not only because it elevated the sterilization issue’s prominence with the public generally, but also because it helped eugenics advocacy groups and state legislators learn the statutory requirements that the judiciary would deem constitutionally permissible. Only one day after *Buck*, an article in the *Los Angeles Times* gestured toward this point, linking the Court’s opinion with potential legislative activity: “The Virginia State law providing for the sterilization of mental defectives was upheld today by the United States Supreme Court in an opinion deemed of much importance because of the agitation for similar legislation in other States.”

Harry Laughlin, the sterilization movement’s foremost proponent during the 1920s and 1930s, identified one of *Buck*’s main virtues as providing a central statutory text for sterilization reformers. Writing in 1930, Laughlin contended that *Buck* “marked the termination of the basic experimental period in American eugenic sterilization laws,” because it provided a clear understanding of the requirements courts would uphold in the face of constitutional challenges.

Legislators interested in enacting similar statutes, Laughlin explained, “now

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145 See *supra* note 144, at 10.

146 See *Lombardo*, supra note 56, at 174 (“Press reaction was overwhelmingly positive.”); see also Editorial, *Sterilization*, BOS. GLOBE, May 4, 1927, at 20 (commending compulsory sterilization).

147 See *Kevles*, supra note 44, at 111 (“After *Buck v. Bell*, what was constitutional was clear.”);

Jacob Broches Aronoff, *The Constitutionality of Asexualization Legislation in the United States*, 1 ST. JOHN’S L. REV. 146, 173 (1927) (“Two decades of experimentation and litigation have made it possible to draw fairly definite conclusions of what is required of a law authorizing or making mandatory the sterilization of the socially unfit, to keep it within the provisions of the bill of rights as included in the Federal and the various state constitutions.”).

148 *Supreme Court Upholds Sterilization of Unfit*, supra note 144, at 1.

know in what due process of law consists when a state undertakes to enforce sterilization on selected inmates of certain state institutions.”

Evidence suggests that legislatures seeking to enact new compulsory sterilization measures knew that the Court had deemed Virginia’s sterilization statute constitutional. Individual legislators sometimes invoked Buck in an effort to convince their colleagues to adopt sterilization measures. Legislative knowledge of Buck’s outcome is further exemplified by the way in which post-Buck statutes closely resembled the Virginia statute. The resemblance is so striking that observers have often contended Virginia’s measure, validated in Buck, provided a sort of model statute for sterilization reform. In 1932, Jacob Landman noted that the Virginia statute “serve[d] as a model human sterilization law,” and authors have repeatedly invoked that same idea ever since. If the Virginia measure did act as a model statute, moreover, precious few legislatures seemed inclined to deviate much from the model when they enacted sterilization measures for their own states. Substantial deviations from Virginia’s statute represented legal uncertainty, and that was precisely what Buck had eliminated.

Some knowledgeable observers of compulsory sterilization statutes have suggested that Buck did not merely allow, but affirmatively caused the spread of the measures. For instance, Jacob Landman, writing in 1932, commented:

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150 Id. at 54-55; see also id. (“We know that in such cases certain definite administrative initiative, and procedure to the actual surgical operation, subject to court review (as provided by the Virginia statute), constitutes due process of law.”).

151 See Sterilization Bill Offered at Albany: End of ‘Race Degeneration’ Is Goal—Would Affect Certain Types in Institutions, N.Y. TIMES, Feb. 20, 1935, at 8 (noting that a State senator from Binghamton commented when introducing a measure: “Our new bill is modeled on the Virginia statute, which has been upheld by the Supreme Court of the United States . . .”). B.O. Whitten, the architect of South Carolina’s compulsory sterilization statute, also demonstrated awareness of Buck: “Justice Holmes of the United States Supreme Court said; ‘Three generations of imbeciles are enough.’ We have on record four generations of imbeciles in South Carolina and three generations of them are now at the State [institution].” LARSON, supra note 42, at 125.

152 J.H. LANDMAN, HUMAN STERILIZATION 84 (1932).

153 See LARSON, supra note 42, at 28 (calling the Virginia measure a “model eugenic sterilization statute”); see also Frances R. Schoenbach, Sterilization Laws—Their Constiutionality—Their Social and Scientific Basis, 17 B.U. L. REV. 246, 250 (1937) (“With [Buck], the Virginia Statute became a model for the other states, which had only to amend their laws or pass new ones in accordance with the pattern of the Virginia law.”).

154 See, e.g., PHILIP R. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 88 (1991) (“All the laws enacted between 1927 and 1930 included procedural safeguards comparable to those in the Virginia law that had been upheld by the Supreme Court.”); Paul A. Lombardo, Three Generations, No Imbeciles: New Light on Buck v. Bell, 60 N.Y.U. L. REV. 30, 31 n.5 (1985) (noting that compulsory sterilization statutes passed between 1927 and 1937 were “closely patterned after the Virginia law”); Richard T. Young, An Evaluation of Washington Marriage Laws, 12 WASH. L. REV. & ST. BAR J. 112, 134-35 (1937) (observing that recently-enacted sterilization laws were “modeled after the Virginia statute”); West Virginia to Map Policy of Sterilization, WASH. POST, June 27, 1934, at 18 (disclosing that West Virginia’s law was “almost an exact copy of [the] Virginia law upheld in Buck”).
“The declaration of constitutionality of the Virginia law by the Supreme Court of the United States in 1927 in the Buck v. Bell case caused a wave of human sterilization legislation to spread over the country.”

Ten years later, an article in the Virginia Law Review agreed that Buck “breathed new life into the struggle advocating compulsory sterilization of mental defectives.” Yet even if one believes that such statements are overblown, it seems unmistakable that the legislatures learned what sort of measures would work from the Supreme Court’s opinion.

### 2. Salutes

The Supreme Court’s opinion in Gobitis, validating flag salute requirements in public schools, also generated considerable media attention. Where Buck elicited journalistic celebration, Gobitis instead drew journalistic condemnation. More than one hundred seventy newspapers criticized Gobitis, and only a handful of publications praised the decision. Among the chorus of critics, the St. Louis Post-Dispatch’s editorial offered a particularly barbed assessment: “We think this decision of the United States Supreme Court is dead wrong. We think its decision is a violation of American principle.”

As disparagingly as Gobitis was received in the nation’s newsrooms, however, the opinion received a warm reception in many of the nation’s classrooms. Gobitis enabled educators to learn that they could expel schoolchildren who refused to salute the American flag without violating the Constitution, and it was a lesson that many teachers and principals would exhibit mastery of during the next three years.

It did not take long for school officials around the nation to demonstrate awareness of Gobitis. On the day following the Court’s decision, the Boston Post ran an article noting: “Informed that the United States Supreme Court, by an 8 to 1 decision, had upheld Pennsylvania law requiring public school pupils to salute the American flag without violating the Constitution, and it was a lesson that many teachers and principals would exhibit mastery of during the next three years.

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155 LANDMAN, supra note 152, at 89.
157 See, e.g., John B. Oakes, Flag Salute Rule in Schools Held Valid by Supreme Court, WASH. POST, June 4, 1940, at 1; Flag Salute Order Upheld, L.A. TIMES, June 4, 1940, at 1; Ruling Upholds Right to Order Flag Salute, BOS. GLOBE, June 4, 1940, at 7.
158 For a few criticisms of Gobitis, see Editorial, Problem in Freedom, N.Y. TIMES, June 5, 1940, at 24; Frankfurter v. Stone, NEW REPUBLIC, June 24, 1940, at 843.
159 See ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 532 (1956).
160 MASON, supra note 159, at 532 (quoting A Terrible Decision, ST. LOUIS-POST DISPATCH, June 4, 1940, at 2C).
night with a view to taking firmer action.” Relatedly, when a principal in Cherokee County, Kansas, personally visited a home to warn a Jehovah’s Witness mother that her children would be expelled if they refused to salute the flag, she showed the mother a letter from the county superintendent that invoked Gobitis. “The United States supreme court in an opinion filed on June 3, 1940, held that it is within the power of a school district board to exact participation in the flag salute ceremony as a condition of children’s attendance at school,” the letter stated.

Evidence that policymakers learned from Gobitis can perhaps most readily be detected in the underlying facts of the legal dispute that would ultimately become West Virginia State Board of Education v. Barnette, where the Court seized the opportunity to disavow its three-year old precedent. On the heels of Gobitis, the West Virginia legislature enacted a new provision directing schools to “foster[] and perpetuate[] the ideals, principles and spirit of Americanism,” and mandating its Board of Education to implement this measure. In response, the board adopted a statewide resolution requiring students to salute the American flag. Most tellingly, though, as Barnette itself would note, extensive portions of the resolution’s five paragraphs were lifted wholesale from Justice Frankfurter’s opinion in Gobitis. To take only one of many potential examples, the resolution stated: “WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution . . . .” Although the resolution mentions neither Gobitis nor the Supreme Court, the origins of this particular legal learning are unmistakable. A similar, if more muted, dynamic can be discerned in the text of a resolution that Raymond, New Hampshire, enacted on June 10, 1940, exactly one week after the Court issued Gobitis, that required “every pupil, regardless of religious persuasion, . . . shall salute the . . . Flag whenever the salute is called for.” Had the resolution’s drafters been unaware that Gobitis recently validated such requirements in the face of

161 Ask Advice in State’s Flag Cases: Boston, Saugus, Other School Boards May Take Firmer Step, BOS. POST, June 4, 1940, at 1.
164 See Barnette, 319 U.S. at 626-27.
165 See id. at 626 (noting the resolution “contain[ed] recitals taken largely from the Court’s Gobitis opinion”).
166 Id. at 626 n.2. For the resolution’s full text, see id.
167 See supra text accompanying note 89 (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 596 (1940)).
168 MANWARING, supra note 73, at 187 (emphasis added).
religious objection, it seems improbable that the resolution would have explicitly addressed religion.

Some contemporaneous observers connected the sharp increase in salute-related expulsions between 1940 and 1943 to the Court’s opinion sanctioning the practice. The surge in expulsions, one author stated, “must be attributed directly to the results of the *Gobitis* decision.”169 While somewhat more equivocal, the Kansas Supreme Court in 1942 intimated that the Court’s opinion provoked school administrators in Cherokee County, Kansas, to contemplate expelling students for refusing to salute the flag: “It was not until after the decision of the *Gobitis* case . . . that the school boards of the districts where the appellants’ children attended school . . . conceived the notion that the failure of such a child to salute the flag justified expelling the child from school.”170 It is possible, of course, that even if the Court had never validated flag-salute mandates, expulsions of Jehovah’s Witnesses would have still increased between 1940 and 1943. School districts in several states had already installed salute requirements before the Court issued *Gobitis*, and others may have joined them anyway after the bombing of Pearl Harbor in December 1941 increased patriotic sentiment. Nevertheless, David Manwaring—who resists feeble causal attributions to *Gobitis* in other contexts—has flatly concluded: “Many communities passed new salute regulations in direct response to the *Gobitis* ruling.”171 It seems beyond doubt that school administrators learned from *Gobitis* that they need not worry about the constitutionality of expelling students for refusing to salute the flag.

3. Searches

In no doctrinal arena is this learning dynamic more apparent than in the context of the Supreme Court’s opinions involving automotive searches. The Court’s opinion in *New York v. Belton* received coverage from a few high-profile news outlets, but it came nowhere close to making the big media splashes that *Buck* and *Gobitis* had previously made.172 Although law professors frequently criticize the press coverage of the Court for providing what they regard as distorted and misleading accounts, at least one of the journalists summarizing *Belton* did an admirable job of distilling the opinion’s holding in this intricate Fourth Amendment context. Laura Kiernan, writing in the *Washington Post*, observed that *Belton* “ruled that a police officer who has stopped a car and made a lawful arrest may, without a warrant, search

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169 *Heller*, supra note 90, at 449.
171 MANWARING, supra note 73, at 187.
virtually anything in the passenger compartment.” Of course, even had Kiernan—and all other newspaper reporters, for that matter—articulated Belton’s rule in a highly spurious manner, police officers would not have carried out their responsibilities to comport with such mistranslations.

When it comes to constitutional criminal procedure opinions, police officers have plenty of incentives to learn the Supreme Court’s views. Indeed, it risks only modest exaggeration to contend that the Court’s interpretations of the Fourth and Fifth Amendments guide the bulk of an investigating police officer’s legal responsibilities. The point here is not to suggest that patrolling officers, after a long day of walking their respective beats, decompress by curling up in the evening with the Court’s latest slip opinions. They overwhelmingly do not. Instead, police officers responsible for implementing the Court’s directives typically rely upon intermediaries who distill relevant judicial opinions into a manageable set of guidelines. As Belton demonstrates, simply because officers do not generally read Supreme Court opinions in their entirety does not mean that they do not learn their holdings.

The notion that police officers learn what is constitutionally permitted from the Supreme Court arose throughout Gant’s proceedings, and even appeared in the majority and dissenting opinions themselves. During oral argument, Justice Stephen Breyer, who would go on to dissent in Gant, made the following statement in an apparent effort to highlight the costs of abandoning Belton’s bright-line rule: “[W]e tell our police a simple thing. We tell them when you arrest somebody who is in a car you can search the passenger compartment of the car okay. Simple. And we’ve trained a hundred thousand police officers to do that and they do it.”

173  Kiernan, supra note 120, at A4.

174  See William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L.J. 1, 17 (1997) (“When the police frisk a suspect on the street, make an arrest, search or impound a car, enter a dwelling or office, or ask a suspect questions, Fourth and Fifth Amendment rules [as articulated by courts] govern their conduct.”).

175  See Brief for Americans for Effective Law Enforcement, Inc. et al. as Amici Curiae Supporting Petitioner at 18-19, Arizona v. Gant, 556 U.S. 632 (2009) (No. 07-542) (“Most police recruits have not had prior significant exposure to constitutional issues. They are not lawyers and this Court has stated they are not expected to act as lawyers . . . .”).

176  Transcript of Oral Argument at 43, Gant, 556 U.S. 332 (No. 07-542) (emphasis added). Also, during oral argument, an attorney arguing to retain Belton invoked this “train[ing]” language and emphasized the costs of requiring officers to learn a new rule. “Police officers have been trained under Belton for the past 27 years,” the attorney noted. “They have applied it in the field. It would be an undue burden to have to retrain those officers and—and for them to determine under totality of the circumstances analysis when they can and when they can’t conduct searches of automobiles incident to arrest.” Id. at 15-16 (emphasis added). An amicus brief filed by various law enforcement entities that are responsible for training police officers prefigured these usages of the “training” terminology. See Brief for Americans for Effective Law Enforcement, Inc. et al. as Amici Curiae Supporting Petitioner, supra note 175 (“The Belton decision and its progeny are many years old. Law enforcement officers throughout the country have relied upon these decisions for decades. They
Court in Gant, moreover, Justice Stevens confronted the fact that “Belton has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years.”\textsuperscript{177} Despite this long history of reliance, Justice Stevens suggested that the costs of requiring officers to learn a new approach were not prohibitive considering the serious incursions on motorists’ security and privacy that flowed from Belton.\textsuperscript{178} In dissent, Justice Samuel Alito similarly stressed that the Court in Gant required officers to learn a new method of searching, and brought the tangible consequences of that re-education into sharp relief: “The Belton rule has been taught to police officers for more than a quarter century . . . . It is likely that, on the very day when this opinion is announced, numerous vehicle searches will be conducted in good faith by police officers who were taught the Belton rule.”\textsuperscript{179}

Reactions to Gant within the corridors of both law schools and police departments verify that the Supreme Court’s criminal procedure opinions can require police officers to relearn how to execute their duties. In assessing Gant’s significance, Professor Barbara Armacost expressly invoked the language of learning to describe this phenomenon: “[O]fficers will have to learn new, more nuanced rules for conducting traffic stop searches . . . .”\textsuperscript{180} In this same vein, several law enforcement officials independently observed that Gant’s holding meant police officers would need to be re-educated to comply with the Court’s interpretation of the Fourth Amendment. The Chief of Police in Fort Wayne, Indiana, noted: “I think it’s going to be an educational issue where we’re going to have to disseminate [Gant’s holding] to officers and let them know what this change is and what the limitations are.”\textsuperscript{181} A police chief in Arizona agreed that “the officer on the street needs to be have been trained that this is the correct way to balance the need for effective law enforcement and officer safety.”\textsuperscript{182}

\textsuperscript{177} 556 U.S. at 349 (emphasis added).
\textsuperscript{178} See id. at 349-50.
\textsuperscript{179} Id. at 359 (Alito, J., dissenting).
educated,” and that complying with Gant would “boil down to training.”182 In reaction to Gant, some police officers suggested that Belton itself had inspired an earlier round of officer re-education in their jurisdictions. “It’s nothing new, because back in the early 1970s, you were under the same restrictions and then it got more lenient, but now it’s going back the other way,” one police officer in Virginia said.183 Ken Wallentine, a law enforcement official in Utah, shared this general recollection: “I remember being a young cop and being pleasantly surprised by the Belton decision . . . .”184 Wallentine also expressed surprise with Gant, but he had no doubt that officers would learn to comply with the new decision.185

B. Emulating

This Section explores how various groups have emulated the Supreme Court’s legitimation of bad policies because those policies have received the Court’s constitutional blessing.

1. Sterilizations

The Supreme Court’s ability to legitimate state policies in the American constitutional order, and thereby to inspire emulation on the part of some states that lacked the disputed policy can be seen clearly in the context of Buck v. Bell. In Buck’s aftermath, for example, one Alabama newspaper commended the decision as presenting a golden opportunity “to convince open-minded folk that such legislation is wise.”186 Harry Laughlin, the nation’s preeminent champion of sterilization, demonstrated keen awareness of the Court’s emulative effect in 1930 when he explained: “This decision means also that in the future eugenical sterilization will be looked upon by the American people as a reasonable and conservative matter; it is no longer a wild or radical proposition.”187 Six years later, a columnist for the Los Angeles Times similarly attempted to transform general reverence for the Court into support for compulsory sterilization as a mainstream phenomenon: “‘Three generations of imbeciles are enough.’ These are not the words of a

183 Smith, supra note 181 (internal quotation marks omitted).
185 See id.
187 LAUGHLIN, supra note 149, at 53.
propagandist or of a social fanatic, but of a Chief [sic] Justice of the United States Supreme Court in deciding a case that has become a precedent for the decision of the lesser courts of the sovereign states."²⁸⁸ If the vaunted Supreme Court declares that a contested practice does not violate the Constitution, the thinking here seems to run, other states should at least contemplate implementing what cannot be a fringe practice.

The language of legitimation that sterilization scholars use to describe Buck’s effect provides testament to the outsized role the Supreme Court plays in shaping the American constitutional order. In 1929, Jacob Landman predicted the Court’s “official sanction” of sterilization would prompt “many states [to] enact similar legislation.”²⁸⁹ Landman himself observed that this prediction was borne out in just a few years, as he noted in 1932 that sterilization’s validation from “the highest court of the land” played a motivational role in states adopting sterilization measures.²⁹⁰ The passage of decades has only reinforced this reading of Buck. Mary Dudziak contended that Justice Holmes’s “uncritical embrace of eugenic policy . . . gave a shaky eugenics movement a strong stamp of legitimacy.”²⁹¹ Mark Haller similarly noted that, in Buck, “the Supreme Court put its seal of approval upon the Virginia sterilization law, and brought renewed vigor to the sterilization campaign.”²⁹² William Leuchtenberg agreed that Buck “gave the imprimatur of the United States Supreme Court to the eugenics movement,” and thus heralded a new, albeit unwelcome, day.²⁹³

That Buck emerged not just from the Supreme Court, but from the particularly revered mind of Justice Holmes appeared to have enhanced the opinion’s capacity for inspiring emulation. Writing in the St. John’s Law
Review only months after the Court issued Buck, Jacob Aronoff pursued this angle with particular relish. Buck, Aronoff contended, is bound . . . to effect a change in the judicial as well as the popular attitude to this type of legislation. This is due largely to the fact that the opinion was written by Mr. Justice Holmes. Judge Holmes is recognized as a jurist whose social and political philosophy is essentially humane and who recognizes the fact that in constitutional questions the decision of a court is influenced largely by the court's social and political philosophy. An opinion by him finding an asexualization law constitutional will inevitably cause a re-examination of the subject not only from the point of view of the legal questions involved but also with a view of re-evaluating the basis of the non-legal objections directed to all such legislation.194

It may seem as though Aronoff’s remark merely betrays the Court-centric view of the world to which law professors seem particularly prone.195 And that dynamic may well partially be at work here. But, in Aronoff’s defense, reverence for Holmes occupied an important place among educated Americans that seems likely to have imbued Buck with even greater significance.

Harry Laughlin, for his part, seldom seemed to miss an opportunity to lend Buck some additional luster by mentioning that Justice Holmes authored the opinion.196 And for good reason, too. By the time that Holmes wrote Buck in 1927, he had already become a nationally revered figure whose celebrity status extended beyond the narrow confines of law—a rare feat, indeed, even for a Supreme Court Justice. In March 1926, in honor of his eighty-fifth birthday, Holmes’s visage graced the cover of Time magazine, which remarked upon the jurist’s “venerability,” “poetic expression,” and “liberal cast of thought.”197 Time’s praise, enthusiastic though it was, seemed if anything downright restrained in comparison to the jubilation that Holmes’s birthday occasioned at the New Republic during that same year. “The fruit of his wisdom has become part of the common stock of civilization,” the magazine’s editorial solemnly intoned. “Wherever law is known, he is known.”198

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194 Aronoff, supra note 147, at 152.
196 See, e.g., LAUGHLIN, supra note 149, at 53 (“This decision . . . was handed down by Mr. Justice Holmes . . . .”); see also id. at 53 (noting Mr. Justice Holmes’s authorship of the line deriding “three generations of imbeciles”); id. at 62 (noting that “the Supreme Court of the United States, in an opinion read by Mr. Justice Holmes . . . .”).
197 Supreme Court, TIME, Mar. 15, 1926, at 8.
198 Mr. Justice Holmes, NEW REPUBLIC, Mar. 17, 1926, at 88. Although this assessment of Holmes’s influence is surely exaggerated, some evidence suggests that Holmes’s legal celebrity did extend internationally. See Supreme Court, supra note 197 (noting that Holmes’s legal contributions have been increasingly “recognized in the law schools not only of this country but of England”);
continued: “Steeped in legal history, he above all others has shaped the methods and ideas of modern jurisprudence . . . . The tender, wise, beautiful being who is Mr. Justice Holmes in himself redeems the whole legal profession.”

The praise for Holmes during this era was not limited to political publications. Even the *American Journal of Public Health*, in recounting *Buck*’s implications for a medical audience, celebrated Holmes as “that great jurist.”

The power of Supreme Court opinions to elicit emulation should not be viewed as some sort of all-powerful force that mere mortals cannot resist. Jacob Landman appeared to commit this analytical error, overstating *Buck*’s emulative effect on other states in 1929. “Little does it matter what the legislative and judicial history of the sterilization laws in this country has been,” Landman wrote. “*Buck v. Bell* has now definitely committed the United States to a policy of human sterilization for good or for bad as a means of coping with the socially undesirable in our midst.”

But this statement goes too far. In the context of *Buck*, for example, some state legislatures contemplated and then ultimately declined to enact compulsory sterilization statutes. Nevertheless, even if *Buck* did not compel all forty-eight states to adopt compulsory sterilization measures, its emulative effect on many states seems undeniable.

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HANSEN & KING, supra note 58, at 115 (noting that a proponent of sterilization in Ontario, Canada, invoked Holmes by name in an effort to win support to their cause).

199 Mr. Justice Holmes, supra note 198, at 88-89. While this state of euphoria may seem impossible to surpass, the *New Republic* rose to the challenge by publishing—if it is possible—an even more mawkish valentine to Holmes a mere nine months later:

[H]is Supreme Court opinions which have together recast American legal thinking seem to have been formulated in the elegant leisure that we associate with the classics. Mr. Justice Holmes’s tall and erect figure which a ripe and white old age has scarcely stooped; his grand manner, at once noble and dazzling—these have never asked quarter of time. . . . Note the set of the shoulders in the gown, the oval contour of the face with its fine, angular New England features, the flow of the level white brows into the thin distinction of the nose, the martial mustachios, with their heavy guardsman’s droop and their curved ends of punctilio.


200 LOMBARDO, supra note 56, at 175.

201 LANDMAN, supra note 152, at 113 (footnote omitted).

202 Landman’s overestimation of *Buck*’s emulative force, taken from the vantage point of 1929, is, of course, perfectly excusable. As John Hart Ely said of Alexander Bickel’s severely underestimating the durability of key Warren Court opinions: “That only proves he was human—we’ve all mistaken ripples for waves.” JOHN HART ELY, *DEMOCRACY AND DISTRUST* 70 (1980).

203 See HANSEN & KING, supra note 58, at 128 (offering an account of why sterilization legislation may have failed in some states).
2. Salutes

The Gobitis opinion also vividly illuminates the Supreme Court's capacity to lend legitimacy to contested measures, and in turn to motivate policymakers nationwide to adopt matching measures. Gobitis, moreover, displays this emulative effect within a fascinating context: where the Court inspires policy actions even though it may not have intended those inspirational effects. On this view, Justice Frankfurter's opinion in Gobitis approximates the inversion of Justice Holmes's opinion in Buck. Holmes, the ardent eugenicist, would have presumably been delighted that Buck sparked the compulsory sterilization movement; conversely, Frankfurter would have regarded the spark Gobitis provided to compulsory flag salute requirements as inadvertent, and perhaps even unwelcome. In one of the aforementioned passages where Gobitis can be viewed as obliquely casting doubt on the wisdom of flag salute requirements, Frankfurter's opinion may be read as gently encouraging state legislators to prohibit such requirements. Frankfurter, toward the very end of Gobitis, offered an abstract paean to the virtue of judicial restraint in democratic societies. "Where all the effective means of inducing political changes are left free from interference," Frankfurter wrote, "education in the abandonment of foolish legislation is itself a training in liberty."^{204} If Frankfurter actually hoped that policymakers would ban flag salute requirements, subsequent events would make that hope look foolish. Evidently, not a single entity that mandated the flag salute in 1940 jettisoned those measures between the Court's opinions in Gobitis and three years later in Barnette.^{205} The American Civil Liberties Union's brief in Barnette seized upon this evidence and used it to tweak Frankfurter by noting it did "not commend the doctrine that somehow legislative authorities will themselves abandon 'foolish legislation' if 'the effective means of inducing political changes are left free.'"^{206}

The critical point when considering Gobitis's emulative effect is not so much that the opinion failed to prompt the retraction of extant flag-salute measures, but instead that Gobitis appears to have played a role in the expansion of such measures. When the Supreme Court validated the constitutionality of flag salute requirements, the Court's validation itself shaped how those measures were perceived and exerted influence in some

^{204} 310 U.S. 586, 600 (1940). Frankfurter's analysis here loudly echoes the rationale for judicial review provided in the second paragraph of footnote 4 in Carolene Products. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . .").


^{206} Id.
communities. Alpheus Thomas Mason has captured this idea in observing that Frankfurter's aside about "foolish legislation" was undercut considerably by the fact that it appeared in the course of an opinion placing the Supreme Court's "stamp of approval" on that legislation.\textsuperscript{207} "The Court itself thus became a weapon in the struggle for men's minds," Mason explained. "By its approbation, 'foolish' laws become somewhat less so; novel restraint, lodged in the structure of government, had become 'constitutional.' With the blessing of an authoritative Supreme Court judgment, the country's local school officials tightened up on the flag salute requirement,"\textsuperscript{208}

The notion that the Supreme Court's opinion in \textit{Gobitis} elicited a measure of emulation from other jurisdictions is bolstered by the dynamics surrounding West Virginia's adoption of its statewide flag-salute mandate. According to Manwaring's leading account of the flag salute opinions, "West Virginia authorities reached out rather mechanically to take the new opportunities \textit{Gobitis} seemed to offer."\textsuperscript{209} Manwaring contends that West Virginia enacted its measure not because of some deep, abiding conviction regarding the transcendent importance of flag salutes, but instead because an opinion from the Supreme Court authorized the regulations. "When challenged in court, [West Virginians] were willing to play the game out to the end, but with no deep personal involvement in the outcome," Manwaring writes. "Nobody really cared."\textsuperscript{210} On this view, West Virginia's impetus for adopting the measure seems to have been attributable less to the policy's intrinsic appeal, and more to the prestigious actor in the constitutional order that blessed the practice.

Here, too, the ability of judicial opinions to inspire emulation ought not be overstated—yes, even when they are handed down from the highest court in the land. Although \textit{Gobitis} validated flag salute requirements, the Court's imprimatur appearing on such measures did not inoculate the Court—and the practices—from receiving vehement criticism in newspapers and magazines.\textsuperscript{211} \textit{Gobitis} thus reveals that some citizens, in at least some enclaves, at least occasionally, treat the Court's opinion as just that: an opinion on constitutional meaning, rather than the opinion on constitutional meaning that articulates an eternal truth. Still, that \textit{Gobitis} received opprobrium in relatively elite circles should not overshadow that the opinion also encouraged

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\item \textsuperscript{207} Mason, supra note 159, at 533.
\item \textsuperscript{208} Id. at 533.
\item \textsuperscript{209} Manwaring, supra note 73, at 234. Manwaring observes: "Obviously, some people in West Virginia felt strongly about the flag salute, else there would have been no regulation and no expulsions . . . . [But] [a]t no time did they display the sort of driving personal conviction that was evident in the Pennsylvania conflicts." Id.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} See supra text accompanying notes 158–59.
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some emulators along the way. Given that flag salute requirements often stemmed from school administrators making new enforcement determinations about preexisting measures, Gobitis would not have needed to elicit emulation from many actors in order to make a big difference in the lives of Jehovah's Witnesses.

3. Searches

The capacity of Supreme Court opinions to elicit emulation seems least pronounced in the context of New York v. Belton’s authorization of warrantless automobile searches. The conduct of arresting police officers, after all, seems far less likely to stem from any positive associations they have toward the Supreme Court, and more likely to stem instead from a desire to avoid having their work undone, either internally by the police department or externally by a reviewing court. Moreover, because Belton endorsed close to the largest conceivable latitude for law enforcement officials conducting warrantless vehicle searches, police officers may have happily complied with the decision had it issued from even the lowliest court in all the land.

Nevertheless, in the context of warrantless vehicle searches, the emulative effects of Supreme Court opinions might be better construed as diminished rather than nonexistent. For instance, when the arresting officer in Gant was asked at a suppression hearing why he searched the automobile after he had already handcuffed the defendant and placed him in a patrol car, the officer replied simply: “Because the law says we can do it.”212 The arresting officer could have, of course, intended to convey many different sentiments with that opaque statement. But one way of restating this statement more formally would be: “Because the Fourth Amendment, as interpreted by the Supreme Court’s opinion in New York v. Belton, deems such searches ‘reasonable.’” It is almost comically difficult to imagine a police officer uttering that hyperformal statement. But this difficulty is precisely the point. That police officers typically understand the category of “the law” to be more or less coterminous with “Supreme Court interpretations of the Constitution” bespeaks a respect for Supreme Court authority that bears a strong family resemblance to emulation. In response to the Court’s opinion in Gant, moreover, Ken Wallentine, a law enforcement official in Utah, provided a full-throated articulation of the emulative effect that the Supreme Court’s criminal procedure opinions can exert on police officers. “The Belton decision may have made an officer’s job a little easier,” Wallentine commented, “and the Gant decision may well make the job harder, but at the end of the day, cops

will continue to uphold, defend and honor the Constitution as interpreted by the United States Supreme Court.”  

C. Extrapolating

This Section explores how various groups take actions and form policies by extrapolating from misguided Supreme Court opinions.

1. Sterilizations

With Buck established as precedent, legislatures in some states sought to extrapolate from the opinion by expanding the potential classes of candidates for compulsory sterilization beyond those citizens displaying low mental aptitude. The American Journal of Public Health telegraphed such legislative expansions by noting Buck “opens future possibilities of vast importance in the field of eugenics and public health.” In Virginia, for instance, the legislature passed a bill that would have widened sterilization’s scope to include inmates in state-administered institutions suffering from congenital blindness and other specified maladies. Virginia’s Governor, however, vetoed the measure, contending that the proposal would have required the Supreme Court of the United States to validate the new practice, a move that could jeopardize the existing program. In Oklahoma, of course, the state legislature aimed to extend Buck’s structure by enacting a sterilization statute...
that targeted “habitual criminal” offenders.\textsuperscript{217} It was Oklahoma’s effort at extrapolation into the criminal realm that the Court rejected in \textit{Skinner}.\textsuperscript{218}

The eugenics movement greeted these attempted expansions of \textit{Buck} with open arms, as its most devout proponents harbored grand ambitions for expanding the reach of sterilization. Harry Laughlin noted five years after \textit{Buck}, now that compulsory sterilization was “soundly established in long practice,” it should be evident that “the subject for sterilization does not necessarily have to be an inmate of an institution, but may be selected with equal legality from the population at large.”\textsuperscript{219} Laughlin also expressed the hope that compulsory sterilization could even someday be extended to include “apparently normal individuals who have come from exceedingly inferior stocks, judged by the constitutional qualities of their close kin.”\textsuperscript{220} For eugenicists, who viewed \textit{Buck} as bedrock and projected outward from that point, prospects in the quest for improving the human race through sterilization appeared virtually limitless.

2. Salutes

Legal authorities also took \textit{Gobitis} and ran with it, as they utilized the opinion validating flag salute requirements to extrapolate numerous concomitant methods of harassing Jehovah’s Witnesses. After school districts expelled Jehovah’s Witness students for refusing to salute, for instance, several jurisdictions subsequently charged the children with violating truancy and delinquency laws.\textsuperscript{221} The Court’s opinion formed the basis for these charges, one commentator noted, because authorities, “construing (perhaps too literally) the broad grants of power implied by the \textit{Gobitis} decision, . . . have later prosecuted [expelled students] as delinquents.”\textsuperscript{222} Relatedly, jurisdictions also extended \textit{Gobitis} to charge Jehovah’s Witness parents for contributing to the delinquency of their children by instructing them not to salute the flag.\textsuperscript{223} Finally, judges extended \textit{Gobitis} further still, and

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\item \textsuperscript{217} Skinner v. Oklahoma, 316 U.S. 535, 536 (1942).
\item \textsuperscript{218} See id. at 541-42.
\item \textsuperscript{219} REILLY, supra note 154, at 56.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} See, e.g., State v. Smith, 127 P.2d 518, 518 (Kan. 1942); see also MANWARING, supra note 73, at 190 (chronicling efforts to brand Jehovah’s Witness children as delinquents).
\item \textsuperscript{222} William G. Fennell, The “Reconstructed Court” and Religious Freedom: The \textit{Gobitis} Case in Retrospect, 19 N.Y.U. L. Q. REV. 31, 42 (1941).
\item \textsuperscript{223} See Heller, supra note 90, at 449 (“Statutes were enacted holding the parents liable (criminally in some instances) if their children refused to salute the flag”); Victor W. Rotnem & F.G. Folsom, Jr., Recent Restrictions upon Religious Liberty, 36 AM. POL. SCI. REV. 1055, 1062 (1942) (noting prosecutions of Jehovah’s Witness parents for failing to have their children enrolled in school following expulsions). One superior court in Michigan City, Indiana, for example, convicted a Jehovah’s Witness mother of contributing to the delinquency of her two daughters following their
\end{itemize}
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transformed the newly designated delinquents into wards of the state by ordering the Jehovah’s Witness children removed from their homes and sent to reformatories.224 Again, here, the sole justification for such orders was that the children did not attend school following their expulsions for refusing to salute the flag.225

After the Court issued Gobitis in June 1940, moreover, various mobs subjected Jehovah’s Witnesses to hundreds of violent attacks.226 The most serious of these attacks transpired in locations dotted throughout the nation—from Kennebunk, Maine, to Jackson, Mississippi, from Litchfield, Illinois, to Rockville, Maryland.227 The question becomes: Can those attacks accurately be understood as being directly extrapolated from Gobitis? Some scholars have seemed to answer that question affirmatively, appearing to assert that Gobitis single-handedly provoked the violence.228 But the answer to that question seems more nebulous than these scholars allow because mobs, being mobs, tend not to memorialize their animating commitments in written form. A few of the attacks against Jehovah’s Witnesses, moreover, actually antedated the Court’s opinion in Gobitis.229 Accordingly, unless those pre-Gobitis attacks can be construed as occurring in anticipation of the Court’s opinion, the but-for argument seems difficult to sustain. The pre-Gobitis attacks seem more likely attributable to a reservoir of anti-Jehovah’s

224 See Bolling v. Superior Ct. for Callam Cnty., 133 P.2d 803, 804-05 (Wash. 1943); Fennell, supra note 222, at 42 (“That there have been patriotic zealots who have construed the majority decision to permit the taking of children from their parents to send them to reformatories as delinquent children is indicated by the cases.”); Harold H. Punke, The Flag and the Courts in Free Public Education, 24 J. RELIGION 119, 122 (1944) (noting that the issue had also arisen in Massachusetts, New Hampshire, New Jersey, and Texas). For a case illustrating the power of the courts in this realm but ultimately vindicating the child by refusing to deem her delinquent, see In re Jones, 24 N.Y.S.2d 10, 12 (N.Y. Child.’s Ct. 1940) (“I am at a loss to understand, as are all reasonable people, why anyone would refuse to salute the flag of the United States . . . . [It is a tragedy that children should be taught such nonsense, but Doris has been taught this and believes it.”).

225 See id.

226 Rotnem & Folsom, supra note 223, at 1061.

227 See id.

228 See Vincent Blasi & Seana Shiffrin, The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought, in CONSTITUTIONAL LAW STORIES 409, 409-10 (Michael C. Dorf ed., 2d ed. 2009) (“Seldom in its history has a constitutional controversy generated such . . . widespread civic violence directly attributable to a judicial decision . . . .”); Peter Irons, The Courage of Their Convictions 22 (1988) (“Supreme Court decisions are often criticized, and some are disobeyed, but few have ever provoked as violent a public reaction as the Gobitis opinion.”); Leonard A. Stevens, Salute!: The Case of The Bible vs. The Flag 106 (1973) (“Only days after the decision was handed down a surge of violence against Jehovah’s Witnesses swept America. It was clearly triggered by the news of Gobitis.”).

229 See MANWARING, supra note 73, at 163-64.
Witnesses sentiment stemming in part from the nation's well-documented history of hostilities toward religious minorities.230

Still, even if some assessments have been too categorical, it seems safe to conclude that *Gobitis* played a role in leading some vigilantes to conclude that Jehovah’s Witnesses should be punished for disloyalty. This more tentative formulation of *Gobitis*’s effect is how the most discerning newspaper and magazine journalists characterized the situation at that time. “We have the ‘liberal’ members of the Supreme Court to thank—at least in part—for the religious riots which have been breaking out in Maine,” the *New York Herald Tribune* commented. “This conservative old New England state has seen little lynching or other lawlessness; but the Supreme Court’s recent decision that Jehovah’s Witnesses must salute the flag seems to have convinced several hundred Maine rustics that it is their personal responsibility to see this decree carried out.”231 The *St. Louis Post Dispatch* generalized this account:

> It would be a mistake . . . to attribute these outbreaks of violence against religious minorities solely to the United States Supreme Court’s opinion upholding the compulsory flag salute in public schools . . . Yet there can be little doubt that most unfortunate decision will be an encouragement for self-appointed guardians of patriotism and the national moralists to take the law into their own hands.232

*The Nation* echoed this understanding, as it noted that *Gobitis* made a previously “tense situation . . . worse,” by making Jehovah’s Witnesses into “obvious targets for persecution.”233 Manwaring’s historical assessment, written with the benefit of nearly two decades’ hindsight, echoed these qualified contemporaneous evaluations: “All that can be said with any degree of assurance is that *Gobitis* almost certainly helped to touch off what was already an explosive situation.”234

At least one piece of evidence, however, makes unmistakably clear that some observers extrapolated a broad principle from *Gobitis* indicating that Jehovah’s Witnesses were disloyal to the nation. One month after the Court issued *Gobitis*, journalist Beulah Amidon observed a group of vigilantes in a small, unnamed southern town violently force its population of Jehovah’s

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230 See id. at 163.


232 MASON, supra note 159, at 533 (quoting ST. LOUIS POST-DISPATCH, June 10, 1940, at 2C).

233 H. Rutledge Southworth, Jehovah’s 50,000 Witnesses, *NATION*, Aug. 10, 1940, at 111.

234 MANWARING, supra note 73, at 249; see id. at 163 (“While it is a hard point to document precisely, the persecution probably was more widespread and vigorous because of the Supreme Court’s apparent indorsement [sic].”).
Witnesses to vacate the area. As the mob carried out this banishment, they periodically hurled insults along with debris toward the Jehovah’s Witnesses. “We got no room for dirty traitors here,” Amidon overheard one crowd member yell. The local sheriff surveying the procession appeared sympathetic to this assessment, as he made no move to control the crowd. When Amidon approached the sheriff to inquire what had provoked the scene, he responded: “Jehovah’s Witnesses . . . They’re running ‘em out of here. They’re traitors—the Supreme Court says so. Ain’t you heard?”

Even if that message was decidedly not the one Gobitis sent, it was nevertheless the one that some audience members received.

3. Searches

The Court’s criminal procedure jurisprudence, as exemplified by Belton and Gant, involves a context where a considerable amount of extrapolation seems guaranteed. Some sophisticated academic commentators have suggested that police officers will, almost by their very nature, consciously probe the Fourth Amendment’s constitutional boundaries. Wayne LaFave, for example, has contended that while police officers will not generally transgress clear borders that courts have established regarding searches, they will march right up to the line of what courts have deemed permissible. According to LaFave, lower courts encountered so much trouble applying Chimel’s “immediate control” test to vehicles before Belton, largely because law enforcement officials sought to test, and even to expand, existing constitutional limits. “[T]he ‘difficulty’ and ‘disarray’ [in lower courts] the Belton majority alluded to has been more a product of the police seeing how much they could get away with . . . than of their being confronted with inherently ambiguous situations,” LaFave wrote. With this view in mind, Belton provided police officers with strong incentives to maximize their interactions with any motorists they deemed suspicious in the hopes that an ensuing search would uncover incriminating evidence.

Legal scholarship can be understood as suggesting that police officers built upon Belton to extrapolate a broad principle that eventually enabled them to conduct exploratory searches of almost any moving vehicle. At two
key steps along the way, the Supreme Court aided law enforcement’s successful effort to win virtually unfettered discretion in such automotive searches. First, in Whren v. United States, the Supreme Court authorized police officers to pull over motorists for committing trivial traffic infractions, even if the stop was plainly pretextual.240 Second, in Atwater v. City of Lago Vista, the Supreme Court authorized police officers to arrest motorists for committing even the smallest of misdemeanor traffic offenses.241 With Belton as a background force, these two cases combined to mean that an officer who wanted to search a car, but had no genuine basis for doing so, could acquire justification by trailing the car for the short distance required to witness the driver commit a traffic infraction.242 As one writer distilled the trilogy’s implications: “The officer could then pull the vehicle over (Whren), arrest the driver for the traffic infraction (Atwater), and get a ‘free’ search of the vehicle incident to the driver’s arrest (Belton).”243 That the burden of these exploratory searches would fall disproportionately on racial minorities was perfectly predictable.244 Indeed, given today’s racial realities, some police officers extrapolating lessons from the Belton-Whren-Atwater line of cases might even conclude that the Court had given them licenses to conduct racially-motivated exploratory searches.

Until this point, I have explored the notion that the Supreme Court can act as a bad teacher. Examining the Court-as-educator analogy from this unconventional vantage point leaves us better positioned to appreciate what it would mean for the Supreme Court to teach in the more conventional sense. In other words, understanding how the Court has taught badly enhances our ability to understand how the Court has taught well. It is to this task—illustrating the Supreme Court as good teacher—that I now turn.

243 Stoughton, supra note 239, at 1746.
244 See Armacost, supra note 180, at 294 (noting evidence that police officers stop and search minority motorists in “disproportionate numbers”); see also Stuntz, supra note 242, at 3-5 (condemning racial profiling as a foreseeable consequence of the Supreme Court’s jurisprudence because discretion and discrimination travel together). For illuminating recent histories that explore the fraught intersection of race, policing, and automobile travel, see Sarah A. Seo, Policing the Open Road: How Cars Transformed American Freedom (2019), and Gretchen Sorin, Driving While Black: African American Travel and the Road to Civil Rights (2020).
III. GOOD TEACHING REVISITED

The Supreme Court can be understood to teach well in at least two distinct senses. First, the Court can validate a constitutionally desirable policy and thus assist it in becoming more widespread by enabling other jurisdictions to learn, emulate, and extrapolate from the validated measure. Second, the Court can suppress a constitutionally undesirable policy by issuing an opinion that invalidates the measure and thus remove it from the menu of available policies.

A. Good Policy Diffusion

The first three background phases that potentially invite concluding that the Supreme Court has acted as a good teacher are identical to those explored above for reading the Supreme Court as a bad teacher. First, a period of legal uncertainty is; second, eliminated by a Supreme Court opinion validating a particular policy, which; third, becomes substantially more widespread throughout the nation following the opinion. Only with the fourth phrase do the good teacher and bad teacher models diverge: Where in the bad teacher model examined above the Supreme Court reversed course (by either overturning its prior decision outright or dramatically retreating from its initial opinion), in the good teacher model the Supreme Court instead stays the course (standing by the core holding and reasoning of its initial opinion). With this fourth condition, in other words, the Supreme Court teaches badly when it imparts an incorrect substantive lesson, and the Supreme Court teaches well when it imparts a correct substantive lesson.

The Court’s opinion in Ginsberg v. New York—which upheld a state law that prohibited selling pornographic materials to minors, but not to adults—provides an excellent encapsulation of the Court’s ability to serve as a good teacher.\footnote{390 U.S. 629 (1968).} Prior to Ginsberg, considerable legal uncertainty engulfed the question of whether states could ban sexually graphic materials in an effort to avoid harmful influences on youth without violating the First Amendment. States clearly could not realize their desire to shield youth from sexual content by simply banning the sale of lewd material to anyone in the entire state, regardless of age.\footnote{See Butler v. Michigan, 352 U.S. 380, 383 (1957) (invalidating the broadly drawn measure because it amounted to “quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence.”).} Many states, of course, maintained a desire to prevent children from accessing sexual materials, but the question was how they could do so in a manner consistent with the Constitution. As one of the amicus briefs filed in Ginsberg supporting New York’s statute described the
existing legal landscape: “To say that the law is currently up in the air is an understatement of the true state of affairs.”

It was against this nebulous legal backdrop that the New York legislature in 1965 offered what was then a relatively unusual approach for addressing the problem. The New York legislature addressed the issue of youth and sexually explicit materials by enacting a “variable obscenity” law. This measure prohibited selling sexually explicit materials to minors on the theory that these materials were obscene for children and adolescents, even though the identical materials would not be obscene for adults. The New York legislature crafted the statute in extraordinarily detailed language in order to minimize encroachments on the freedom of expression. In Ginsberg v. New York, the Supreme Court in 1968 eliminated this period of legal uncertainty by validating New York’s narrowly drawn statute. Justice William Brennan’s opinion for the Court in Ginsberg reasoned that the state possesses greater authority to control the conduct of children than adults, and that the state also had a legitimate interest in promoting the health and well-being of its youth. Accordingly, Brennan concluded it was not irrational for New York legislators to determine that viewing the sex material statutorily defined as obscene would be harmful to minors.

After the Court issued Ginsberg, legislators around the nation quickly leaped to enact variable obscenity statutes modeled on the New York measure. In a book published in 1970, only two years after the Court issued Ginsberg, Stephen Wasby commented upon the outpouring of legislative activity. “At least twenty city councils across the country were found to have passed statutes like that validated in Ginsberg in less than a year from the time of the decision,” Wasby wrote. “Additional impact of Ginsberg is shown by the numerous state statutes passed in 1969 legislative sessions, with language closely tracking that of the New York statute, and in the language of proposed federal legislation dealing with the mailing of obscene material or advertising.

248 See 1965 N.Y. Laws 1066, ch. 327 (repealing and replacing Penal Law Section 484-h) (“AN ACT to amend the penal law, in relation to the commercial dissemination of harmful material to persons under the age of seventeen years . . . .”).
250 1965 N.Y. Laws 1066, 1066-68.
252 See 390 U.S. at 645.
253 See id. at 638-39.
254 See id. at 643.
to minors."255 This initial legislative frenzy did not soon subside. By 1976, Frederick Schauer could note that Ginsberg had sparked reform in nearly all fifty state legislatures: "[V]irtually every state has a statute dealing in particular with the sale, distribution or exhibition of obscene materials to minors. The origin of all these statutes is the Supreme Court's decision in Ginsberg v. New York . . . ."256

Since the Court decided Ginsberg, it has in no way retreated from its core determination that states may prohibit minors from purchasing sexually explicit materials that they cannot prohibit adults from purchasing.257 In order to appreciate Ginsberg's continued vitality, consider that the dispute was triggered when a storeowner sold "girlie' magazines" to a minor.258 Such prohibitions remain very much alive today, even if the Internet has succeeded in rendering them virtually irrelevant.259

The same three mechanisms through which subsets of the public respond to the Court's bad teaching also pertain to the Court's good teaching. With respect to Ginsberg, evidence suggests that legislators learned what policy would pass constitutional muster, emulated that policy in light of the Supreme Court's clout, and extrapolated additional policies that might be seen as extensions of the validated policy. I will now briefly explain how each of these three mechanisms applies to Ginsberg.

Evidence suggests that legislators learned from Ginsberg because in the opinion's aftermath states enacted variable obscenity statutes that were essentially facsimiles of New York's statute. Several writers predicted early on that the New York measure would serve as a sort of model statute for other jurisdictions.260 That prediction, of course, bore fruit almost immediately. In

255 WASBY, supra note 135, at 142; see Stanley K. Laughlin, Jr., A Requiem for Requiems: The Supreme Court at the Bar of Reality, 68 MICH. L. REV. 1389, 1392 (1970) (noting Ginsberg "touched off a spate of legislative activity, both federal and state").


258 390 U.S. at 631.

259 See, e.g., Amy O'Leary, So How Do We Talk About This?, N.Y. TIMES, May 10, 2012, at D1. It is certainly true that the Court declined to extend Ginsberg's logic when it invalidated laws prohibiting minors from purchasing violent video games. See Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011). But declining to extend Ginsberg's reasoning into nonsexual contexts does not mean that the Court has retreated. See Stone, supra note 257, at 1868 (noting Ginsberg has no applicability "to the regulation of violent expression").

260 See, e.g., Steinkamp, supra note 251, at 141-42 ("[T]he New York Legislature enacted a statute which, because of Ginsberg, can serve as a model for all other state and local legislative bodies that wish to curtail the flow of obscene materials to minors." (footnote omitted)); Fred P. Graham,
November 1968, only seven months after Ginsberg, one newspaper article commented the decision “touched off a hopeful scramble among states which do not yet have” variable obscenity statutes. In 1970, Stanley Laughlin commented that “[i]n response to Justice Brennan's opinion, legislative draftsmen, following a time-honored practice, have slavishly copied” New York's statute. The influence of New York's variable obscenity statute, as noted above, has proved extremely durable.

That the Supreme Court placed its imprimatur on a variable obscenity statute appears to have prompted emulation on the part of legislators mindful of the Court's prestige in matters of constitutional interpretation. One commentator noted that Brennan's opinion in Ginsberg seemed to go out of its way to “give[] license to the states to experiment” with shaping particularities of their variable obscenity statutes. But the states overwhelmingly rejected that invitation. It hardly seems extravagant to maintain that so many jurisdictions enacted variable obscenity statutes closely resembling New York's not because legislators from around the country admired the constitutional acumen of New Yorkers, but instead because they admired the constitutional acumen of the Supreme Court. Some sense of the Court's emulative effect can be gleaned from the comments of a legislator in Puerto Rico who boasted that the territory's newly enacted variable obscenity statute “was approved with the rules that the National Supreme Court has put to define what is obscenity.” Similarly, when the California legislature enacted a variable obscenity statute modeled on New York's law, the state's Attorney General testified in support of the measure that “the bill would bring California law into compliance” with Supreme Court precedent.

Some legislators attempted to extrapolate from Ginsberg an overarching principle that legislative bodies may adopt broadly drawn measures in an effort to protect minors from nudity. In 1972, four years after the Court issued Ginsberg, the city council of Jacksonville, Florida, enacted an ordinance that prohibited drive-in movie theaters from showing films with nudity if their

Obscenity Laws for Children Argued, N.Y. TIMES, Jan. 17, 1968, at 36 (noting after oral argument that New York's variable obscenity statute was “expected to be widely copied if” the Court validated it).

261 Charles Bartlett, Public Must Erect Dam Against Flood of Filth, BOS. GLOBE (Nov. 19, 1968), at 19.

262 Laughlin, supra note 255, at 1392; see also The Minnesota Legislature, 1969 Regular Session, 54 MINN. L. REV. 1029, 1083 (1970) (“Numerous state legislatures have followed suit by passing statutes similar to that of New York.”).

263 Samuel Krislov, From Ginzberg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation, 1968 SUP. CT. REV. 153, 188.


screens were visible from public places. When a theater challenged the ordinance, Jacksonville sought to defend the measure by contending that it enacted the measure to shield minors from such visible displays. In Erznoznik v. City of Jacksonville, Justice Lewis Powell’s opinion for the Supreme Court invalidated the ordinance as in effect improperly stretching Ginsberg’s reasoning. Erznoznik clarified that Ginsberg had not authorized legislatures to ban minors from accessing all nude images, but only images that were obscene. “Clearly all nudity cannot be deemed obscene even as to minors,” Justice Powell explained. If Jacksonville intended to protect minors from all nudity, Powell reasoned, the ordinance was overbroad because it would bar films displaying “a baby’s buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous.” Erznoznik determined that Jacksonville’s extrapolation from Ginsberg was, in sum, a bridge too far.

There is no reason to believe that Ginsberg represents some once-in-a-lifetime teaching phenomenon for the Supreme Court. Other instances where the Supreme Court can be understood as teaching well by assisting policies in becoming more widespread no doubt exist. Legal scholars in a diverse array of fields ought to expend the energy required to unearth these examples of desirable policy diffusion so that a more thorough examination of the Supreme Court’s teaching capacities may finally commence.

B. Bad Policy Suppression

The Supreme Court can also act as a good teacher by invalidating undesirable policies. By ruling certain matters out of the nation’s bounds, the Supreme Court sends the important message that—even if majorities of important policymakers wish to enact particular measures—those measures may nevertheless be deemed constitutionally impermissible. If political scientists label the occurrence of measures growing more widespread as “policy diffusion,” the converse phenomenon might helpfully be termed policy suppression. To return

266 Erznoznik v. City of Jacksonville, 422 U.S. 205, 206 (1975) (quoting JACKSONVILLE, FLA., MUNICIPAL CODE § 330.313 (1972)).
267 Id. at 207.
268 Id. at 213.
269 Id.

270 Henry Glick’s work examining the fallout from the Supreme Court’s opinion upholding a state law in Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990), indicates that other jurisdictions responded to the Missouri statute in the same way that jurisdictions responded to New York’s variable obscenity statute after Ginsberg. In Cruzan, the Supreme Court validated the Missouri requirement that a patient must exhibit by clear and convincing evidence a desire to have life support removed before that measure would be taken. Glick observed that post-Cruzan “many state legislatures changed their laws to conform” with Missouri’s statute, even though the decision required no such thing. Henry R. Glick, The Impact of Permissive Judicial Policies: The U.S. Supreme Court and the Right to Die, 47 POL. SCI. Q. 207, 218 (1994).
to the educational metaphor, when the Court engages in policy suppression, it is roughly equivalent to an elementary teacher who corrects a student presentation misinforming the class that the earth’s surface is flat.

This policy suppression phenomenon is readily illustrated by the Court’s opinion in *West Virginia State Board of Education v. Barnette*, where it invalidated measures found in all forty-eight states that permitted schools to expel students for refusing to salute the American flag.²⁷¹ It seems highly improbable that *Barnette* instantly convinced all school administrators who were expelling Jehovah’s Witnesses that it was misguided to do so. Nevertheless, from a policy suppression viewpoint, the important aspect of *Barnette* is that the Court succeeded in interpreting the First Amendment to restore some measure of order to schools within the American constitutional order. Even if school administrators did not necessarily agree with *Barnette*, they nonetheless followed it. Schools throughout the country adhered to *Barnette*’s holding, as the expulsions of Jehovah’s Witnesses quickly dwindled in its wake.²⁷²

Additional examples of the Supreme Court’s good teaching through policy suppression abound in constitutional law. Indeed, a decent portion of most introductory constitutional law courses are dedicated to examining opinions that involve the Court invalidating state or local governmental actions under one provision of the Constitution or another. Consider *Loving v. Virginia*, where the Court invalidated state antimiscegenation statutes.²⁷³ Also consider *Plyler v. Doe*, where the Court invalidated Texas’s effort to prevent unauthorized immigrants from attending public schools.²⁷⁴ Finally, consider *Romer v. Evans*, where the Court invalidated Colorado’s attempt to exclude sexual orientation from receiving protection under local antidiscrimination laws.²⁷⁵ The Court in those three opinions—and many others besides—invalidated measures enacted by various states, and removed those stains from the nation’s constitutional fabric. In so doing, the Court imparted the foundational lesson that some laws simply have no place in the United States. As with *Barnette*, these acts of policy suppression may not have eliminated overnight the underlying desire in other

²⁷² See MANWARING, supra note 73, at 242 (“[S]tate and local compliance with the *Barnette* ruling was immediate and substantial.”).
²⁷³ 388 U.S. 1 (1967).
states to enact similar measures. Indeed, one need not possess an especially fertile imagination to envision that some of those measures could still today achieve considerable support at least in certain quarters. Nevertheless, provided that the Court's opinions remain good law, no real danger exists that such measures will be enforced.

IV. IMPLICATIONS

This Part examines three essential lessons that legal audiences should draw from appreciating how the Supreme Court has acted as a teacher, both for ill and for good. First, grasping the Supreme Court’s teaching role complicates a dominant view in modern constitutional scholarship contending that the Court merely amplifies the consensus attitudes of the American people. Second, contrary to persistent claims that the judiciary is institutionally incapable of producing meaningful reform, highlighting the Court’s teaching capacity demonstrates that social reformers are sometimes well served by pursuing their policy agendas through litigation rather than legislation. Third, reclaiming the notion that the Supreme Court teaches not only allows readers to step back and realize how metaphors pervade legal discourse, but also to glimpse how judges subscribing to the teaching metaphor might also shape law’s substance.

A. Judicial Latitude

Understanding that the Supreme Court has in fact played the role of a teacher challenges a prominent theory of modern constitutional scholarship holding that the Supreme Court interprets the Constitution in a manner that reflects the views of an existing national consensus or an emerging national consensus. On this theory, which I have elsewhere labeled consensus constitutionalism, the Supreme Court is portrayed as issuing opinions that serve merely to ratify popular attitudes. Accordingly, consensus constitutionalists insist, it makes little sense for law professors assessing the Court’s work in hindsight either to celebrate Justices for issuing opinions that society ultimately embraces or to condemn Justices for issuing opinions that

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278 See, e.g., FRIEDMAN, supra note 276, at 16 (contending Supreme Court opinions “serve as a catalyst, to force public debate, and ultimately to ratify the American people’s considered views about the meaning of their Constitution”).
society eventually rejects. When legal scholars applaud and bemoan Supreme Court opinions from yesteryear, this theory contends, they ignore the contemporaneous environments within which the Court actually operated—a tendency that leads legal academics to miscast Supreme Court Justices in the roles of villains and heroes. Justices certainly wear black robes, but consensus constitutionalists assert that it is delusional to perceive them as accessorizing the outfits with black hats—or white ones either.

At first glance, the three bad teacher opinions examined above might plausibly be construed as reinforcing the idea of consensus constitutionalism. After all, consensus constitutionalists could note, the Supreme Court’s opinions in *Buck, Gobitis,* and *Belton* can each be understood as validating policies within national environments that featured considerable support for the measures. In *Buck,* the Court validated compulsory sterilization in an environment where the influential Progressive movement championed the cause. In *Gobitis,* the Court validated compulsory flag salutes in an intensely patriotic environment, with the United States hurtling toward involvement in World War II. In *Belton,* the Court validated law enforcement’s ability to search vehicles when arresting motorists in an environment beset by concern with drug trafficking and drug usage. To portray the Court as a “bad teacher” in these three decisions,

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279 See, e.g., KLARMAN, supra note 136, at 443–68 (emphasizing that the Supreme Court’s reviled decision in *Plessy v. Ferguson* and its celebrated decision in *Brown v. Board of Education* should both be understood as products of their times—and extending that broad principle to the Court’s work as a whole).

280 See, e.g., KLARMAN, supra note 136, at 6 (critiquing the tendency within legal scholarship to lionize judicial heroes and vilify judicial villains).

281 See JEREMY AGNEW, THE OLD WEST IN FACT AND FILM 131 (2012) (noting the convention in Western films of having heroes wear white hats and villains wear black hats to symbolize the struggle between good and evil).

282 CLEMENT E. VOSE, CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900, at 17 (1973) (“[W]e are all time-bound, and with the eugenics movement at its height in 1927 the Court was its prisoner.”); Lombardo, supra note 154, at 32 (referring to the “eugenics craze of the Progressive Era” (internal quotation marks omitted)).

283 An editorial in *The New Republic* appearing in the wake of *Gobitis* stated: “This country is now in the grip of war hysteria . . . .” Frankfurter v. Stone, NEW REPUBLIC, June 24, 1940, at 843; see also Witnesses Examined, TIME, July 29, 1940, at 40 (“World War II has made patriotism a second religion for many a U.S. citizen.”).

284 President Richard Nixon declared drug abuse “public enemy number one,” a statement that prompted some to observe that he had declared War on Drugs. See *U.S. Heroin Addiction Reported On Decline After Peaking in ’69,* N.Y. TIMES, June 29, 1973, at 28; Robert B. Semple Jr., *Nixon Defends His Record Combating Drug Trade,* N.Y. TIMES, Sept. 19, 1972, at 38. It may well be no accident that all four of Nixon’s appointees to the Court—Chief Justice Burger, Justice Blackmun, Justice Powell, and Justice Rehnquist—voted to uphold the search in *Belton,* whereas only one of the five non-Nixon appointees to the Court did so. Justice Stewart (appointed by Eisenhower) joined the Nixon appointees; Brennan (Eisenhower), Marshall (Johnson), Stevens (Ford), and White (Kennedy) all dissented. President Reagan waged the War on Drugs with particular enthusiasm. In recent years, public attitudes have shifted dramatically toward the War on Drugs. See, e.g., Nicholas Kristof, *Republicans and Democrats Agree: End the War on Drugs,* N.Y. TIMES (Nov. 7, 2020),
consensus constitutionalists might protest, is to overestimate the Court’s capacity for offering resistance to emerging and existing societal agreement on such matters. On this account, rather than censuring the Supreme Court for its decisions in *Buck*, *Gobitis*, and *Belton*, any opprobrium should instead be directed toward the nation as a whole because that is where the responsibility actually lay.

Upon closer inspection, however, it becomes clear that accepting the consensus constitutionalist account of these three opinions improperly obscures the ample judicial latitude that the Supreme Court possessed to issue countervailing opinions in these cases. In *Buck*, it seems more accurate to construe the Court’s opinion as extinguishing the dominant legal viewpoint that rejected compulsory sterilization statutes rather than as acquiescing to a national consensus that affirmed the legitimacy of such statutes.\textsuperscript{285} In *Gobitis*, while many school officials across the nation seized the opportunity to expel Jehovah’s Witnesses for refusing to salute the American flag, the decision also elicited many vehement critiques, particularly in elite circles.\textsuperscript{286} In *Belton*, it seems highly improbable that the nation evinced anything approaching a consensus attitude on the relatively low-salience question of whether warrant requirements apply when officers arrest motorists; indeed, even within consensus constitutionalism’s own outlook, any suggestion of national consensus seems undermined by the sharply divergent views that lower courts expressed on this question before *Belton*.\textsuperscript{287}

In each of these three bad teacher cases, then, there can be little doubt that the Court enjoyed sufficient judicial latitude to issue an opinion invalidating the contested policies. Even scrutinizing the context where the consensus constitutionalist argument appears to contain the greatest explanatory force actually serves only to highlight the immense judicial latitude that the Court typically possesses when issuing decisions. With patriotic sentiment running high in 1940, it may initially seem unfathomable that the Court in *Gobitis* could have realistically instructed local school districts to refrain from expelling any students for refusing to salute the American flag, let alone students who were part of a deeply unpopular religious minority. Yet, this consensus-based argument collapses in the face of the Court’s decision in *Barnette*, an opinion that appeared in 1943, during the thick of the nation’s involvement in World War II and at a time when the conflict’s outcome remained deeply uncertain. Protecting free speech during wartime presents the Court with a particularly tall order, but in *Barnette* the

\textsuperscript{285} See supra text accompanying notes 43–47.
\textsuperscript{286} See supra text accompanying notes 158–59.
\textsuperscript{287} See supra text accompanying notes 108–11.
Court summoned the judicial will to vindicate the infringed constitutional rights. If the Court possessed enough judicial latitude to issue *Barnette* within that tense historical moment, it seems undeniable that it could have also invalidated the measures found in *Buck* and *Belton*.

Thus, one need not ignore historical context in order to criticize the Supreme Court for teaching badly or to maintain that it could have realistically taught well in all three of these cases by invalidating the policies. These Supreme Court opinions permitted and enabled what were at the time widely, though not universally, regarded as undesirable policies to become more widespread still. Contrary to the consensus constitutionalism approach, those opinions were in no way dictated by dominant social attitudes. Accordingly, it is completely appropriate to critique all three opinions as having imparted regrettable teachings that damaged our constitutional order.

Conversely, just as it is appropriate to criticize the Supreme Court for teaching badly, it is also appropriate to commend the Supreme Court for teaching well. Consensus constitutionalists express skepticism when scholars praise Supreme Court Justices for issuing opinions that are vindicated over time because such praise, they contend, overlooks the deeper background forces in society that actually produced the celebrated opinion. Yet such consensus-inflected accounts can accord the Court too little credit for a job well done. In *Ginsberg*, the Court's opinion vindicating the very specific and narrowly drawn variable obscenity statute produced in New York enabled other legislatures around the nation to learn from the statute and to address the underlying concern in a targeted, sensible fashion. By upholding an exemplary statute that avoided the harms flowing from a hysterical, overbroad approach to the issue, the Court taught the nation a valuable lesson in preserving the freedom of expression. Thus, even if it is presumed that the Court would almost inevitably have upheld some statute restricting minors from obscenity, the *Ginsberg* Court should nevertheless be commended for selecting the extremely specific New York measure instead of a statute that wantonly stifled speech.

The Court should also be commended for teaching well when it constitutionally invalidates measures and, in the process, suppresses undesirable policies. To take only two examples of relatively recent vintage, the Court's opinions in *Plyler v. Doe* and *Romer v. Evans* protected marginalized members of society and instructed unmistakably that certain state laws—excluding unauthorized immigrants from public schools and excluding sexual minorities from the reach of local antidiscrimination law,

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288 See generally GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004) (observing that protection for the freedom of expression is often sacrificed during war time).
respectively—clashed with our constitutional traditions. While each of these measures only existed in one state when the Court invalidated them, it would be severely mistaken to dismiss the opinions as merely reflecting the nation’s consensus attitudes. To the contrary, substantial evidence indicates that the measures at issue in *Plyler* and *Romer* would have—in the absence of the Court’s invalidation—become prevalent. Accordingly, the opinions eliminating these regrettable policies should be celebrated for imparting valuable constitutional lessons to the nation.

**B. Judicial Fragility**

Appreciating that the Supreme Court possesses the capacity to teach also complicates the influential idea within legal scholarship that aspiring social reformers should necessarily turn their attention away from courts and instead focus their energy on legislators. Although many scholars have emphasized what they regard as the Court’s fundamental fragility, no single work has advanced this argument with greater intensity than Gerald Rosenberg’s *The Hollow Hope*. “Turning to the courts to produce significant social reform substitutes the myth of America for its reality. It credits courts and judicial decisions with a power that they do not have,” Rosenberg argues. When social reformers pursue litigation rather than legislation, Rosenberg warns, they misdirect limited financial resources that would be better dedicated to political mobilization. In Rosenberg’s account, filing lawsuits is strategically unwise because litigation possesses little or no capacity for generating the inspirational effects found in the political arena: “Rally round the flag is one thing but rally round the brief (or opinion) is quite another!” This broad skepticism of the Supreme Court’s ability to shape society, however, requires considerable revision.

Advising social reformers to abandon judges in favor of legislators imposes a false strategic binary on individuals who seek to advance their respective causes. Such advice obscures how judicial victories can subsequently be translated into policy and legislative victories—a dynamic that the Court’s underappreciated role in making measures more widespread throughout the nation elucidates. Reformers do not invariably squander resources when they pursue their agendas through litigation rather than

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291 *See* id. at 960, 966-69, 977-78 (citing polling data and other evidence supporting the notion that the measures the Court invalidated in *Plyler* and *Romer* would have spread to other states).
292 ROSENBERG, supra note 7, at 422.
293 *See* id. at 343-44.
294 Id. at 422.
legislation. To the contrary, winning a Supreme Court case can constitute a wise financial investment because of judicial opinions’ capacity for teaching. However wrongheaded were the aims of advocates seeking compulsory flag salute measures, for example, it is exceedingly difficult to construe them as squandering their resources by obtaining victory in *Gobitis*. It seems evident that school administrators adopted the relevant policies far more extensively than they would have in the absence of such a high-profile legal triumph.

In some instances, moreover, reformers are virtually required to file lawsuits initially in order to dispel pervasive fears that its preferred policies are unconstitutional. In both *Buck* and *Ginsberg*, advocates of compulsory sterilization and variable obscenity statutes can be understood as using litigation to eliminate existing impediments to their policy preferences—victories that were necessary to obtain before they could concentrate squarely upon the business of promoting legislation. Similarly, social reformers who want the Court to engage in policy suppression may well find their best opportunities for success exist in the courthouse rather than the statehouse. Indeed, numerous social reformers addressed above turned to the courts precisely because they recently suffered legislative defeats. For the groups who lost battles in three different statewide contests—involving a compulsory flag salute measure, legislation excluding unauthorized immigrants from school, and a statewide antigay referendum—the judiciary represented the only viable hope they had on the immediate horizon. The judicial victories secured in *Barnette*, *Plyler*, and *Romer* advanced those causes in momentous ways, and—contrary to those who emphasize the Court’s alleged fragility in vindicating contested constitutional rights—those decisions produced not merely a triumph of symbolism but durable, tangible results.

Focusing on the Supreme Court’s teaching role also suggests that its capacity for inspiration is considerably more vigorous than Rosenberg’s jocular assessment acknowledges. Perhaps nowhere is the Court’s ability to inspire people to “rally around the opinion” more apparent than in the context of compulsory sterilization. Harry Laughlin desired the Supreme Court’s imprimatur on a compulsory sterilization statute in large part because he thought that an opinion validating the practice would demonstrate sterilization’s mainstream appeal and render it impossible to dismiss as a fringe phenomenon. Laughlin’s plan worked: the Virginia measure validated in *Buck* provided a model statute for jurisdictions around the country. Justice Holmes’s oft-repeated aphorism from *Buck*—which quickly

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295 See generally id. at 1–8, 39–169 (contending that judicial decisions—including *Brown v. Board of Education*—often produce only symbolic victories rather than tangible results).

296 See supra text accompanying notes 57–60, 1555–56.

297 See supra text accompanying note 187.
became the sterilization movement’s unofficial motto, both internally and externally—crystallizes the Court’s capacity for inspiring reform movements. Just as the Supreme Court possesses the ability to inspire proponents, moreover, it is important to realize that the Court also possesses the ability to dissuade opponents. Although several elected officials expressed constitutional opposition to compulsory sterilization measures before Buck, Justice Holmes’s opinion seems to have (at least temporarily) cut the constitutional legs out from under the opposition. While these dynamics may appear most starkly in Buck, these effects of inspiration and dissuasion cannot be limited to the context of sterilization during the 1920s and 1930s.

At least on occasion, the Supreme Court issues opinions that shape the underlying policy and legislative landscapes more profoundly than skeptical assessments like The Hollow Hope allow. Reformers who wish to see their ambitions realized would be foolish to ignore the Court’s capacity for teaching. It would, of course, be mistaken to view the Court as an all-powerful entity, as some scholars seemed to assume before Rosenberg’s insightful corrective arrived. But it would also be mistaken to overcorrect the earlier narrative and construe the Court as a powerless entity. Teachers are not omnipotent, but sometimes they make a real difference.

C. Metaphors Matter

At this point, some readers may be tempted to dismiss this extended effort to place the teaching metaphor on firmer ground as constituting an exercise in sheer frivolity. With so many momentous legal questions worthy of addressing, this critique might run, why pursue a question that seems of little consequence or perhaps even no consequence at all? Rather than engaging in a meta-scholarship debate that analogizes the Supreme Court’s role to the teaching

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298 Cf. Tushnet, supra note 4, at 219 (“I believe that those memorable lines play an important part in the Court’s educational effort.”).

299 See LOMBARDO, supra note 56, at xii (“[I]n [Buck’s] wake, opposition to sterilization seemed to melt away.”). Judge J. Skelly Wright made this point in a generalizable fashion many years ago: “[L]awyers know that, theoretically at least, the Court’s finding a statute constitutional implies nothing about its wisdom. Nevertheless, until the Supreme Court validates it, the opposition’s argument that it is unconstitutional, or simply unwise, may induce the majority to take a second look. Once the Supreme Court warrants the statute, the opposition is undercut.” J. Skelly Wright, The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?, 54 CORNELL L. REV. 1, 7 (1968).

300 See DRIVER, supra note 15, at 20 (“[I]f constitutional professors from earlier times were wrong to believe that the [Supreme Court] could achieve almost anything, today’s revisionist legal scholars are incorrect to suggest that it can accomplish virtually nothing.”).
profession, this critique may continue, it would be far more worthwhile to
dedicate that energy toward analyzing, say, a recent Supreme Court opinion.

This objection, however, misses the mark. The simple explanation is that,
when it comes to the law, metaphors matter. So many distinguished legal
scholars over the years have explored the educational metaphor regarding the
Supreme Court not because they were engaging in an intellectual frolic but
rather because they understood that metaphors have consistently played a
significant role in shaping legal realities. The centrality of legal metaphors
clearly applies at the level of particular legal doctrines, as Supreme Court
opinions have often invoked metaphors when adjudicating cases. In the First
Amendment context alone, for example, Justices have repeatedly argued that
the Constitution establishes a "marketplace of ideas,"301 guards against
"chilling effects,"302 and erects "a wall of separation" between church and
state.303 These metaphors—and many others besides—do not serve as mere
window dressing; instead, they have been integral to the Court’s analysis and
have shaped its determinations.

More pertinently, legal metaphors also exert influence in ways that
transcend the substance of isolated doctrines and apply to the judicial system
as a general proposition. Writing more than four decades ago, then-Justice
William H. Rehnquist advanced precisely this point when he published a law
review article criticizing the idea that the Constitution should be viewed as a
living, evolving document. “While it is undoubtedly true, as Mr. Justice
Holmes said, that ‘general propositions do not decide concrete cases,’ general
phrases such as [the Living Constitution] have a way of subtly coloring the
way we think about concrete cases,” Rehnquist wrote.304 More recently,
Justice Antonin Scalia’s extrajudicial writing and speaking took aim at the
Living Constitution metaphor. In making an extended case for originalism in
1998, Scalia complained: “The ascendant school of constitutional
interpretation affirms the existence of what is called The Living Constitution,
a body of law that . . . grows and changes from age to age, in order to meet
the needs of a changing society.”305 In 2011, Scalia informed the Senate

301 See, e.g., Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).
For the earliest articulation of this concept, see Abrams v. United States, 250 U.S. 616, 630 (1919)
(Holmes, J., dissenting) (“Those who would restrict the freedom of the press and thought in the
name of protection against subversion, either needlessly suppress truthful ideas that are not
subversive or merely rationally suppress those they do not like because that is the best test of truth.
In the competition of the market.”).
376 U.S. 254, 300 (1964) (Goldberg, J., concurring).
303 See, e.g., Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948); Wallace v. Jaffree,
Judiciary Committee that he was “hoping the Living Constitution will die.”\(^{306}\) Rehnquist and Scalia have attacked the idea of a Living Constitution, in other words, because they understood that allowing the metaphor to go uncontested may eventually produce judicial opinions that they would dislike. Although Scalia could plausibly portray living constitutionalism as the dominant framework in 1998, that task would be considerably more difficult today.\(^{307}\) If originalism is now ascendant, living constitutionalism has experienced a sharp decline.\(^{308}\) In response to this dynamic, however, a few liberal law professors have recently mounted defenses of the Living Constitution metaphor.\(^{309}\) These legal scholars, like Rehnquist and Scalia, appreciate that the metaphor’s vitality may have important consequences for the nation’s developing body of constitutional law.

Widespread belief in the significance of judicial metaphors can also be observed in the many responses elicited by the judge-as-umpire analogy that then-Judge John Roberts offered during his confirmation hearings to become Chief Justice in 2005.\(^{310}\) Law professors certainly did not shy away from interrogating Roberts’s analogy.\(^{311}\) Of perhaps even greater significance, though, many judges and former judges of considerable distinction have explored Roberts’s umpire analogy—with some of them deeming it illuminative of the judicial undertaking and others deeming it obfuscatory.\(^{312}\)


308. See William Baude, Essay, Is Originalism Our Law?, 155 COLUM. L. REV. 2349, 2408 (2015) (“Is originalism our law? The resolution of that dispute turns out to be critical to debates about how judges should behave, and yet it is a dispute that most originalist scholarship ignores. On balance, I think the answer is ‘yes.’”).


310. See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55-56 (2005) (“It’s my job to call balls and strikes.”); see also id. (“Judges are like umpires. Umpires don’t make the rules, they apply them.”).

311. See, e.g., Neil S. Siegel, Umpires at Bat: On Integration and Legitimation, 24 CONST. COMMENT. 701, 701 (2007) (interrogating the umpire metaphor in the context of race-conscious student assignment cases); Michael P. Allen, A Limited Defense of (at Least Some of) the Umpire Analogy, 32 SEATTLE U. L. REV. 525, 529 (2009) (acknowledging the dangers inherent in the use of the umpire analogy but concluding that the risks are worth taking).

Setting aside the particular question of whether the judge-as-umpire analogy in fact provides an accurate portrayal of judging, however, the larger point is that judges themselves demonstrate extensive engagement with metaphors that purport to describe the judiciary. It would be surprising, of course, if such professional self-conceptions did not in some meaningful sense inform how judges performed their responsibilities.

If legal metaphors sometimes affect judges in substantive ways—as Justice Rehnquist long ago posited—the question becomes: is it normatively desirable to have Supreme Court Justices understand themselves as issuing opinions that teach, in the manner that this Article has suggested? Substantial benefits seem likely to flow from Justices accepting this notion of judicial teaching. Internalizing this idea of teaching would encourage Justices to assess their decisions by taking the long view, motivating them to contemplate whether subsequent generations will embrace their opinions or reject them.

In addition, being aware that the Court has taught badly in its history should encourage Justices to confront even more directly whether issuing a particular opinion could result in incorrect constitutional lessons spreading throughout the nation. History suggests that Justices should be particularly sensitive to the danger of teaching badly when they assess legislation and policies that can meaningfully be understood as the products of repressive politics. Being aware that the Court has periodically taught well, moreover, should encourage Justices to bear in mind that many of Court’s most celebrated moments have occurred when it has invalidated state and local measures that undermine central notions of equality and liberty. Finally, when the Court issues an opinion validating a particular measure, the Justices should do so understanding that the measure may well proliferate due to the Court’s validation, and that other jurisdictions may seek to extend the measure. Opinions validating measures do not necessarily guarantee that they will become more widespread, but Justices should at least entertain that real possibility before issuing decisions.

Highlighting these virtues, however, should not be taken to disregard the possibility that having Justices who subscribe to the Court-as-teacher metaphor could yield negative consequences. One especially unattractive

consequence of Justices perceiving themselves as teachers is that doing so could invite them to develop grandiose conceptions of their role in American society. Teachers are typically regarded as important and knowledgeable authority figures, and Justices—with this exalted vision of teaching in mind—could well increase the psychic distance they place between themselves and the rest of society.\textsuperscript{313} In this vein, it may be no accident that former Justice Anthony Kennedy—a man sometimes accused of reveling inordinately in the trappings of judicial power\textsuperscript{314}—has most readily embraced the notion that judges are teachers. If Justices who are under the influence of the teaching spell somehow grew to consider themselves omniscient entities, that development would be regrettable. Yet this account may exaggerate the downsides of Justices endorsing the teaching metaphor. As an initial matter, internalizing the notion that the Court has taught badly should lead the Justices to develop strong senses of teacher humility. The teaching metaphor, moreover, could not plausibly be blamed for single-handedly causing judicial feelings of omniscience; such sentiments, of course, long predate that metaphor’s introduction into constitutional conservation. At most, then, the teaching metaphor could be assessed responsibility for intensifying judicial grandiosity, not for instigating it.

In any event, the significance of the Court-as-teacher notion should not be overstated in its ability to control substantive legal outcomes. Indeed, two Justices, both of whom subscribe to the notion that Supreme Court opinions can teach, could well find themselves on opposing sides of the same case. One Justice may view a case as presenting an opportunity to teach well by invalidating a measure and thus attempt to suppress an unwise policy. Conversely, another Justice may view that case as presenting an opportunity to teach well by upholding a measure and thus enable other jurisdictions to learn, emulate, and extrapolate from that measure. Justices bring different judicial philosophies with them to the bench, and those philosophical differences may at least periodically—and perhaps even frequently—trump any metaphorical commonality. In sum, legal metaphors matter to the judicial process, but it would be ludicrous to contend that they are the only things that matter. Any suggestion to the contrary should itself be rejected as an instance of bad teaching.

\textsuperscript{313} See \textsc{Larry D. Kramer}, \textsc{The People Themselves: Popular Constitutionalism and Judicial Review} 7 (2005) (decriing Supreme Court Justices as an out-of-touch group of elites); Eisgruber, supra note 3, at 1032 (portraying the educational metaphor as “flatter[ing]” to judges).

\textsuperscript{314} See, e.g., \textsc{Jeffrey Toobin}, \textsc{The Nine: Inside the Secret World of the Supreme Court} 147 (2007) (portraying Justice Kennedy as excessively enamored with the perks of his judicial office).
CONCLUSION

Several decades have now elapsed since Eugene Rostow first asserted that the Supreme Court played the role of a teacher in the American constitutional order. Perhaps the most remarkable aspect of the voluminous scholarship that has subsequently invoked this analogy in subsequent years is how little that mountain of writing has served to refine and develop Rostow’s observation. This Article has endeavored to recast understandings of how the Court teaches by analyzing the question from a novel perspective. Instead of beginning the inquiry by conceiving of the Court as a supremely gifted teacher, this Article instead addressed the issue from the opposite tack, identifying and analyzing instances where the Court was a strikingly inept teacher. In response to steady criticisms of the teaching metaphor emphasizing that American citizens are generally unaware of judicial decisions and therefore do not much resemble students, this Article has provided detailed case studies illuminating how Court opinions have in fact taught discrete groups of policymakers in various constitutional settings. Moreover, in response to steady criticisms regarding the absence of tangible evidence indicating the Court’s supposedly educational role, this Article has demonstrated how Supreme Court opinions have stimulated policymakers to learn, emulate, and extrapolate lessons and thereby enabled Court-validated measures to become more widespread. Somewhat counterintuitively, by focusing upon how the Court has taught badly, it becomes easier to see how the Court has taught well—by both facilitating the spread of constitutionally desirable policies and suppressing constitutionally undesirable policies. Comprehending how the Court actually teaches, both for good and for ill, yields significant insight into today’s modern legal landscape by inviting reassessment of dominant theories within legal academia. Thus, while some scholars have suggested that viewing the Supreme Court as a teacher is more confounding than clarifying, it turns out that demands to remove the educational metaphor from legal discourse altogether now themselves appear misguided.